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IN THE

United States

1290
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corporation
Formed, Organized and Existing
Under and by Virtue of the Laws
of the State of California, and a Citi-
zen and Resident of the Said State,

Defendant-Appellant,

versus

William H. Cochran, a Citizen of the
State of New York,

Complainant-Appellee,

and

William H. Cochran as Trustee for
Pacific Crude Oil Company,

Intervening Complainant-Appellee.

BRIEF FOR APPELLEES.

THEODORE MARTIN,

Solicitor for Appellees.

WM. H. COCHRAN,
Of Counsel.

FILED

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F. D. MONCKTON,

CLERK

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No. 3666.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corporation
Formed, Organized and Existing
Under and by Virtue of the Laws
of the State of California, and a Citi-
zen and Resident of the Said State,

Defendant-Appellant,

versus

William H. Cochran, a Citizen of the
State of New York,

Complainant-Appellee,

and

William H. Cochran as Trustee for
Pacific Crude Oil Company,

Intervening Complainant-Appellee.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Under the rules of this Honorable Appellate Court,
no "Statement of the Case" is ordinarily required in
the appellees' brief. Exception, however, is made

where such likewise particularly required statement in the appellant's brief, "is controverted" by the appellees. (Rule 24, par. 3.)

Appellees seriously controvert the statement or "abstract of the case" as set forth in appellant's brief in this cause, in that, in certain particulars, it is neither accurate nor complete; and also in that it states certain facts, and certain conclusions or inferences on what the record on this appeal shows or fails to show, which are not supported by that record.

It seems to appellees, that were they to here specifically and in detail set out these points of controversy, they would be imposing an undue burden on the court, by setting forth at some necessarily considerable length, what later must be repeated, and what, also under the rules, must be clearly stated and discussed in the argument in this brief. In that argument, appellees will clearly point out and show the inaccuracies and imperfections of appellant's "abstract of the case."

Appellees, therefore, respectfully request this Honorable Court's consideration of this general objection, with the assurance that the specific and detailed grounds thereof, will be fully presented and shown later in the course of appellees' argument in this brief.

Appellant's assignment of errors, and also the arguments and contentions presented by appellant's brief, naturally divide themselves into three separate subdivisions or classes: 1. Questions going to the jurisdiction of the District Court; 2. Questions which go

to the case as a whole; and 3. Questions on the merits or facts in the case.

Appellees' argument will consider and discuss such questions accordingly, and in that order.

BRIEF OF APPELLEES' ARGUMENT.

FIRST POINT.

The District Court Had and Properly Assumed Original Jurisdiction of This Suit, as It Is a Suit in Equity Between Citizens of Different States of the United States, and in Which the Matter in Controversy Exceeds, Exclusive of Interest and Costs, the Sum or Value of Three Thousand Dollars, and Such Jurisdiction Continued Unimpaired, and Was Lawfully Continued to Be Exercised by the Said Court Throughout the Entire Proceedings in the Suit.

I.

STATEMENT OF APPELLANT'S CLAIMED JURISDICTIONAL QUESTION.

The Honorable District Court's jurisdiction was invoked by complainant, solely on the ground—as properly and specifically alleged in the bill—of the diversity in the citizenship of the parties to a suit in equity, in which the sum or value of the matter actually in controversy exceeded three thousand dollars. Such juris-

diction is, therefore, dependent upon these two jurisdictional elements in the suit.

It has not be questioned, and, in fact, it is conceded by all the parties to this suit, and is also established by the evidence, that the matter in controversy herein exceeds the necessary jurisdictional sum or value of three thousand dollars, as prescribed and limited by "The Judicial Code."

Appellant, however, questions and attacks on this appeal, for the first time, the District Court's jurisdiction in this suit, because—as appellant asserts in its "Assignment of Errors"—of the insufficiency of evidence to show diversity of citizenship of the parties hereto.

Appellant's contention in this particular, is set forth in its assignment of errors in the following language:

"65. The court erred in not finding and decreeing that it had *no jurisdiction* of this action or of the subject matter thereof, and in not ordering and decreeing a dismissal of the bill of complaint herein, *on the ground and for the reason that the evidence was insufficient to show* that the cause of action was one between citizens of different states of the United States."

The only other assigned errors which at all involve this question of jurisdiction, are numbered 63 and 64. These are of practically the same purport and effect—the one being but a negative of the other—that the District Court "had no jurisdiction," and accordingly should have dismissed the bill. But no

cause or reason is assigned in support of this general statement against jurisdiction. That these particularly assigned errors are, however, based on the same claim as is set forth in assigned Error No. 65, quoted *supra*, is clearly evidenced by appellant's "Abstract of the Case," wherein appellant asserts, as the only ground for its claim against jurisdiction, the insufficiency of evidence to show diversity of citizenship between the parties. In fact, there can not possibly be any other claim against jurisdiction in this suit, than want of diversity of citizenship.

It should be particularly noticed that appellant thus clearly distinguishes between any possible failure of the bill to plead the essential jurisdictional facts (which is not claimed by appellant), and the asserted deficiency of proof on that subject, in the evidence. This distinction is of vital importance in determining the principles and rules of law applicable to the actual question presented on this appeal; and also in construing and determining the applicability of any decisions, which may be cited as authorities on the general question of jurisdiction.

Appellant concedes, as it has not questioned the propriety and legality of its having been done, that, because of these properly alleged jurisdictional facts, the District Court, immediately upon the filing of the bill, had plenary jurisdiction over the cause, and lawfully assumed the same; and that, at least up to the entry of the interlocutory decree, the court properly continued to exercise such jurisdiction.

This is certainly made clear by appellant's assignment of errors, in which the only specific error against the District Court's exercise of jurisdiction is limited to the court's not having ordered a dismissal of the bill herein on the ground that "*the evidence was insufficient* to show that the cause of action was one between citizens of different states." (Error No. 65, cited *supra*.) A condition which, even if true, could have arisen only after the hearing in the cause had proceeded and had been completely finished.

In passing, it may properly be called to the attention of this Honorable Court, that at no time did either of the defendants raise any issue, or present any question, in the District Court, on the bill's specifically alleged diversity in the citizenship of the parties to the suit; or on the likewise alleged resultant jurisdiction of the District Court; nor did either of the defendants ever make any motion whatsoever to dismiss the bill because such diversity in citizenship did not actually exist; or for the District Court's want or failure of jurisdiction from any cause whatsoever. Both these questions, of diversity of citizenship and of failure of jurisdiction, are raised for the first time in this suit, on this appeal.

Diversity in the citizenship of the parties being the only questioned essential element of jurisdiction, the questions naturally arise:

1. How such element should appear in the suit, to justify the court's not only having assumed to take

jurisdiction of the suit at its commencement; but also having continued to exercise such jurisdiction to the suit's final termination?

2. How any issue as to such diversity of citizenship should and must have been raised and presented? And

3. On which of the parties rested the burden of proof in connection with such an issue, even if and when it has been properly raised and presented?

Appellees' contentions on these several points will be fully presented later in this brief; but their answers to these several questions may be generally stated as follows:

1. The allegations of the bill which properly show diversity in the citizenship of the parties to the suit, were and are *prima facie* to be taken as true; and were sufficient not only to confer, but also to continue jurisdiction until the contrary of such allegations was properly and lawfully affirmatively proved and established to be the fact, and that the court was thus without lawful cognizance of the suit.

2. An issue of jurisdiction should, and, if at all, must have been raised by the answer to the bill. And such answer should have contained a specific denial of the bill's alleged jurisdictional facts, upon which complainant relied to sustain the District Court's jurisdiction. And if such alleged jurisdictional facts were not thus specifically denied by the answer, they shall

be deemed to be confessed by defendants; and shall be taken and considered as true for all the purposes of the suit;

3. The diversity in the citizenship of the parties having been properly alleged and shown by the bill, and even if any issue thereon had been properly raised by the answer, the burden was on defendants to defeat the resultant jurisdiction, by showing and establishing, through sufficient legal proofs, that such allegations of the bill were untrue.

II.

THE PROPERLY ALLEGED DIVERSITY IN THE CITIZENSHIP OF THE PARTIES TO THIS SUIT, WAS NOT AT ISSUE IN THE DISTRICT COURT AND, IN FACT, DEFENDANTS CONCEDED SUCH DIVERSITY TO EXIST. NOR WAS THE DISTRICT COURT'S JURISDICTION OF THIS SUIT AT ISSUE, OR EVER OR AT ALL QUESTIONED IN THAT COURT.

A.

The Pleadings Present No Issue as to the Bill's Properly Alleged Diversity of Citizenship of the Parties: Nor as to the Likewise Properly Alleged Jurisdiction of the District Court.

Before entering upon any consideration of the pleadings in this suit, it is pertinent to briefly refer to the Supreme Court rules regulating the practice in suits in equity, in so far as such rules prescribe the necessity and the form of pleading jurisdictional facts; and

likewise how any issue thereon shall and must be raised and presented.

The essential jurisdictional allegations for the bill of complaint are prescribed by Equity Rule 25, which, in part, provides as follows:

“RULE 25. Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:

“*First*, the full name, when known, of each plaintiff and defendant, and the citizenship and residence of each party. * * *

“*Second*, a short and plain statement of the grounds upon which the court’s jurisdiction depends.”

The necessary form and contents of the answer to the bill of complaint is prescribed by Equity Rule 30, which provides, in part, as follows:

“RULE 30. The defendant in his answer shall in short and simple terms set out his defense to each claim asserted by the bill omitting any mere statement of evidence and avoiding any general denial of the averments of the bill, but *specifically admitting or denying or explaining* the facts upon which the plaintiff relies, unless the defendant is without knowledge, in which case he shall so state, such statement operating as a denial. *Averments other than of value or amount of damage, if not denied, shall be deemed confessed*” etc.

We pass now to the pertinent allegations and statements of the bill, and of the answer in this suit; and

to their consideration in the light of the equity rules just cited.

The introductory part of the bill of complaint in this suit sets forth that "*William H. Cochran, a citizen of the state of New York*, brings this his bill of complaint against" the named *defendants who are citizens of the state of California*, and resident within the District Court's jurisdiction.

The bill then alleges as follows:

"*First. Jurisdiction of this case arises, and is given to this Honorable Court, by reason of the diversity of the citizenship of the parties hereto.* Complainant is now, and always has been a citizen of the state of New York.

"Complainant's hereinafter particularly mentioned and described assignor, Pacific Crude Oil Company, is a corporation formed, organized and existing under and by virtue of the laws of the state of Delaware, and is also a citizen of the said state of Delaware."

These allegations are supplemented by further allegations in the same paragraph "First" of the bill, that both defendants are citizens of the state of California, and residents within the District Court's jurisdiction; and that the amount in controversy exceeds the sum or value of three thousand dollars.

The joint and several answer of the two defendants, to this bill of complaint, says, *inter alia*, as follows:

"I"

"*Defendants have no knowledge or information sufficient to enable them to form a belief as to the truth*

of the allegation in paragraph 'First' of complainant's bill, that complainant is now and always has been a citizen of the state of New York, and basing their denial upon that ground, *deny that complainant is now, or always, or at any time has been, a citizen of the state of New York.*

"Otherwise than as herein set forth, defendants admit every allegation of paragraph 'First' of said bill."

It surely is apparent that the *sole issue* thus raised by this portion of the answer, *is whether or not the complainant was a citizen of the state of New York at the time of the filing of his bill in this suit; and also further that, aside from that issue, defendants admitted each and every other of the above quoted allegations of the bill to be true, both in fact and in law.*

What did defendants thus admit?

Equity Rule 25 requires simply "a short and plain statement of the grounds upon which the court's jurisdiction depends"; which with the other specified statements (not jurisdictional) "*shall be sufficient*" for a proper bill.

This requirement of the rule was fully met by the allegation in the bill, that "*jurisdiction of this case arises * * ** by reason of the diversity of the citizenship of the parties."

This bill, however, also went much further than merely alleging that jurisdiction thus "*arises,*" for it further also specifically alleges that "*jurisdiction*

* * * *is given*" by reason of the properly and sufficiently well alleged diversity of citizenship.

Defendants' answer presents no denial of either of these particular allegations of the bill; or even a denial that such diversity in citizenship actually existed.

Defendant's only denial is limited to the allegation of complainant's citizenship in the state of New York. While their admissions unquestionably admit the truth of every other allegation of this paragraph "First" of the bill.

If defendants had actually and in good faith intended to raise and present any issue as to jurisdiction, can it be questioned but that they should have denied such alleged diversity in citizenship, and also that the alleged jurisdiction in fact existed? And also have further denied that the alleged jurisdiction was "*given*" to the District Court by reason of such alleged citizenship?

These just quoted allegations of the bill certainly required some answer. And, if not denied, their truth is deemed to be confessed by defendants, under the provisions of Equity Rule 30. Defendants' answer certainly presents no denial of either of the allegations. *These allegations must, therefore, either be included within the allegations of the bill which are formally admitted by the answer to be true: or being unanswered and not denied, must be deemed to be true.*

In either event, the result is the same, to-wit, that the answer raised no issue either as to the bill's prop-

erly alleged diversity of citizenship of the parties to the suit; or as to the likewise alleged jurisdiction of the District Court. These allegations of the bill, consequently, must be deemed to be true; and must be so acted upon for all the purposes of this suit.

That a formal denial of the bill's properly alleged jurisdictional facts was vitally essential to any attempt to impeach the court's jurisdiction, was early laid down by the Supreme Court. Amongst these early decisions is:

Sheppard v. Graves, 14 How. 505, 515, 14 L. Ed. 518,

in which the Supreme Court *held*:

“Although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet, *wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken prima facie as existing, and that it is incumbent on him who would impeach that jurisdiction for causes de hors the pleading to allege and prove such causes: that the necessity for the allegation and the burden of sustaining it by proof both rest upon the party taking the exception.*”

Nor is the doctrine as here presented, at all in conflict with the rule of law which prevents a court

from assuming jurisdiction on the mere consent of parties. For as was said by the Supreme Court in

Denny v. Pironi and Saltri, 141 U. S. 121, 35 L. Ed. 657, 658, and

Pittsburg, C & St. L. R. Co. v. Ramsey, 89 U. S. 322, 22 L. Ed. 823.

“While consent of *parties* cannot give the courts of the United States jurisdiction, they may admit facts which show jurisdiction, and the courts may act judicially upon such admission.”

B.

To Raise Any Issue of Jurisdiction, Defendants' Answer Should Not Only Have Made Specific Denials of the Jurisdictional Averments of the Bill, but Also Should Have Affirmatively Alleged That Complainant Was a Citizen of the State of California.

It has been already discussed and shown, *supra*, that, in order to raise any issue on the bill's properly alleged jurisdiction of the District Court, it was essential that defendants, by their answer, should have made specific denials of the jurisdictional allegations of the bill.

In addition to such jurisdictional denials, *the answer also should have affirmatively alleged that complainant was, in fact, a citizen of the same state as were the defendant, to-wit, the state of California.*

And appellees respectfully submit that it is only on such denials and such affirmative allegation, that an issue of jurisdiction could be raised.

While the defendants deny—because of want of knowledge—that complainant is a citizen of the state of New York, such a denial is in no sense inconsistent with, or opposed to their admission of the District Court's jurisdiction on the ground of the diversity of the citizenship of the parties. Such a limited and specific denial of complainant's citizenship in New York, certainly can not be construed as a denial of the bill's entirely distinct allegations of diversity of citizenship and of jurisdiction. Defendants do not allege or even suggest that complainant is a citizen of California. And it is citizenship in that state only—because of defendants' citizenship therein—which could prevent the court's exercise of jurisdiction in this suit. The particular state of complainant's citizenship is, therefore, an immaterial question, so long as there is no claim of such citizenship in California.

If defendants had really intended to raise the issue of jurisdiction, and to endeavor to defeat complainant's properly alleged claim of jurisdiction, *they should not only have denied the alleged diversity in citizenship, and that such jurisdiction existed and was "given" to the District Court, but also, instead of merely denying that complainant is a citizen of New York, should have affirmatively alleged such citizenship to be in California. Such an affirmative allegation was essen-*

tial to raise the issue of jurisdiction. The sole issue presented by the pleadings, is an immaterial one.

This very same point was presented to the Circuit Court of appeals for the Seventh Circuit, and was thus passed upon and held, in

Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25.

In that case, there were proper averments in the complaint showing that the plaintiff was a citizen of Indiana, and the defendant a citizen of Illinois. To this complaint, defendant filed his plea to the merits, and also his plea in abatement for want of jurisdiction *on the ground that the plaintiff, Shirk, also was a citizen of Illinois*. This issue, the citizenship of the plaintiff below, the defendant in error, Shirk, became one of the controverted questions on the trial. It was urged upon the appeal that the plaintiff below had the burden of showing that at the time of the commencement of the action he was a citizen of the state of Indiana. On this subject, the court says:

“The question is not, as plaintiff in error contends, whether defendants in error have discharged the burden of proving that Elbert W. Shirk was a citizen of Indiana. The proper allegation of jurisdictional facts, prima facie, was true. Simply to deny that Elbert W. Shirk was a citizen of Indiana would not show a want of jurisdiction. He may have been a citizen of some other state than Illinois, whereof plaintiff in error was a citizen. That Elbert W. Shirk was a citizen of Illinois was a material and necessary allegation.”

A petition for a writ of certiorari to review this decision, was denied by the Supreme Court.

180 U. S. 638, 45 L. Ed. 710.

Moreover, the case was approvingly cited and followed by the Supreme Court, in

Hunt v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

The same point was similarly passed upon by the Circuit Court of Appeals, for the Eighth Circuit, in

Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633.

In that case, the complaint properly stated that the plaintiff was a citizen of the state of Illinois, and the defendant a corporation organized under the laws of Missouri. The answer went to the merits of the controversy, and also contained a general denial which it was claimed put in issue the citizenship of the plaintiff. The only testimony on this point was the plaintiffs' statement that he resided in Vandalia, Illinois.

In its opinion, at page 248, the Appellate Court says:

"What the defendant is attempting to do is to challenge the jurisdiction of the court, and in order to do that *he must not simply deny the citizenship as alleged in the complaint, but must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state*, or make such other averments as shall show directly that the cause is beyond the lawful cognizance of the court."

The opinion also approvingly cited and followed *Adams v. Shirk*, as cited *supra*, in this brief.

The Supreme Court denied a petition for a writ of certiorari.

214 U. S. 517, 52 L. Ed. 1064.

In *Adams v. Shirk*, the plea affirmatively and specifically set up that the parties to the suit were citizens of the same state. And it was held this was “a material and necessary allegation” to a plea against jurisdiction.

In *Hill v. Walker*, the answer simply denied the plaintiff’s citizenship as particularly alleged in the bill. And that is exactly the same and the only denial that is made by the answer in this suit. The Appellate Court held in that case that such a denial was insufficient to raise any issue of jurisdiction, as the answer also “*must allege affirmatively facts showing that the plaintiff and defendant are citizens of the same state.*”

C.

The Averments of the Bill of Complaint as to the Citizenship of the Respective Parties to the Suit, Are Prima Facie to Be Taken as True; and the Burden of Disproving Them Rests on the Defendants.

Appellees further contend and respectfully submit that, in any event, the several allegations of the bill of complaint as to the citizenship of the respective parties to this suit, and by which allegations the diversity of the citizenship of the parties, and the jurisdiction of the

District Court is shown, were to be taken by the trial court as *prima facie* true; and that if defendants sought to question such alleged citizenship and the resultant jurisdiction, the burden was on them to have not only specifically denied, but also to have affirmatively disproved such allegations of the bill.

As has been already shown, defendants have admitted by their answer, the truth of these allegations of the bill. But even assuming for the purposes of this argument, that defendants had not made any such admissions, and had specifically denied the jurisdictional averments of the bill, appellees contend that the burden then would have been on defendants to have affirmatively established by proper proofs, that these allegations of the bill were erroneous or not true, and that the District Court, in fact, did not have jurisdiction of the suit.

Appellant raises no question as to the citizenship and residence of the defendants having been properly and truthfully alleged in the bill; but seeks on this appeal, for the first time, to question complainant's properly alleged citizenship, as the basis of its claim against the district court's jurisdiction.

The only error assigned by appellant, which is at all pertinent to this question, is the assigned error No. 65, which is fully quoted, *supra*. The substance of that error is that "*the evidence was insufficient to show*" the diversity of citizenship of the parties to the suit.

The gist of this assigned error is that the evidence was insufficient to support the allegations of the bill in

these particulars; and that the evidence should have affirmatively proved and established such allegations. And appellant contends that the burden of such proof rested on complainant.

Such, however, is not the proper nor correct rule of law, either as to the necessity of any evidence to sustain the bill's properly alleged jurisdictional facts, or as to the burden of proof on such a jurisdictional issue, even if and when properly raised by the pleadings.

The true and long and well established rule of law as to the burden of proof on such an issue, is summarily stated by Simkins in his treatise entitled "*A Federal Equity Suit*" (3rd edition) at page 125, as follows:

"The burden of proof is on the defendant to defeat jurisdiction when the issue is raised."

And again, at page 129, he says:

"As before said, the burden of proof is on the defendant to prove to a 'legal certainty' facts relied upon to defeat the jurisdiction."

And the writer cites numerous cases as authority for his text.

An examination of the opinions of the several federal courts in which this question has been considered and discussed, and this rule of practice and of law enunciated, shows that the rule has been uniformly based on the ground that allegations of jurisdictional facts in the bill, create a prima facie case in favor of jurisdiction.

This rule was thus early laid down by the Supreme Court; and has been repeatedly reiterated and reaffirmed. While there are several earlier decisions wherein it was likewise *held*, this doctrine or rule was thus first clearly and fully stated by the Supreme Court, in 1852, in the case of

Sheppard v. Graves, 14 How. 505, 512, 14 L. Ed. 518,

in the following language:

“With respect to the exception taken to the ruling of the District Court, *as to the obligation of the defendant to prove his averment of the plaintiff's residence in the state of Texas, and not of Louisiana*, as set forth in the petition, were the decision of this question deemed requisite here, we should say that the true doctrine applicable to the question is this: that although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, *yet wherever jurisdiction shall be averred in the pleadings*, in conformity with the laws creating those courts, *it must be taken prima facie as existing, and that it is incumbent on him who would impeach that jurisdiction for causes de hors the pleading, to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the exception.*”

The doctrine as thus laid down, has been repeatedly reiterated and reaffirmed in numerous subsequent decisions of the Supreme Court. The more important

cases which are most generally cited and quoted as the leading authorities, are:

DeSobry v. Nicholson (1865), 3 Wall. 420, 18 L. Ed. 263.

Wetmore v. Rymer (1898), 169 U. S. 115, 42 L. Ed. 682.

Hunt v. New York Cotton Exchange (1907), 205 U. S. 322, 51 L. Ed. 821.

In *Hunt v. New York Cotton Exchange*, the plea to jurisdiction directly raised an issue as to whether or not the amount in controversy was sufficiently large to satisfy the jurisdictional requirements of the statute. On this point of the burden of proof on that issue, the opinion, at page 333, says:

“On the issue presented by the plea *the burden of proof was upon the appellant, and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount.* Sheppard v. Graves, 14 How. 505; Wetmore v. Rymer, 169 U. S. 115; Gage v. Pumpelly, 108 U. S. 164; Adams v. Shirk, 117 Fed. 801.”

That decision, which was rendered in 1907, is of particular interest and importance as it cites *Sheppard v. Graves* in support of this proposition as to the burden of proof. Thus clearly indicating that the rule declared in the much earlier decisions has not been changed in any particular, not even by the Conformity Act of 1872, or by the Act of March 3, 1875, which will be presently referred to.

A full summary and discussion of the decided cases on this subject, is set forth in the very able and voluminous opinion of the Circuit Court of Appeals for the Eighth Circuit, in

Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633.

In order that this brief may not be unduly burdened with less efficient and unnecessary repetition of such presentation and discussion of those numerous authorities, appellees respectfully ask this Honorable Court's examination and consideration of the full opinion in that case.

The Supreme Court not only denied a petition for a writ of certiorari in *Hill v. Walker* (214 U. S. 517; 53 L. Ed. 1064), but has also approvingly cited the case in later of its own decisions.

This very same question was still later again presented to the Supreme Court, in

Chase v. Wetzlar (1912), 225 U. S. 79, 56 L. Ed. 990.

In that case, the appellant cited the several authorities cited *supra* in this brief, in support of the very same contention and doctrine as is here contended for by these appellees.

The Supreme Court held that such authorities were not pertinent to that particular case "which involved a question of jurisdiction under section 8 of the Act of 1875." (Re-enacted as S. 57 of the Judicial Code.) Under the provisions of that section of the act, the

District Court is given jurisdiction over any suit to enforce a lien upon property within the district where such suit is brought, even though the defendants shall not be inhabitants of or found within said district.

After referring to the fact that these cited authorities did not involve the particular jurisdictional question then presented to the court in that case, the opinion continues as follows:

“On the contrary, they all concerned merely the sufficiency or verity of allegations as to the citizenship of parties or the value of the matter in dispute. The cases rested, therefore, upon the proposition that averments concerning such matters were *prima facie* to be taken as true, and hence the burden of truth was cast upon the one assailing the sufficiency or want of verity of such averments. We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875, requiring a federal court *of its own motion* to dismiss a pending suit *when it is found* not to be really within its jurisdiction (cases cited)—because we think, in any view, the doctrine is here inapplicable. *We say this because, while questions concerning the sufficiency or verity of averments as to citizenship or amount in dispute assail the jurisdiction of the court, they do not address themselves to the want of all foundation for judicial action because of an entire absence of elements which are essential to the existence of any jurisdiction whatever,—that*

is, the presence of persons or property within the jurisdiction of the court, over which its authority may be exerted. The character of the questions involved in the cases relied on, and the nature of the rule as to *prima facie* presumption as to the adequacy of averments concerning such subjects, and the resultant burden of proof, is at once demonstrated by the well-settled rule that questions of that character do not go to the power of the court to make a binding decree.” (Cases cited.)

Aside from the fact that the Supreme Court thus points out the theory of law on which this doctrine as to the burden of proof on a jurisdictional issue is founded, there are at least two very important features of that opinion, which are worthy of attention.

One, that the Supreme Court in no way repudiates or even suggests any modification of the doctrine as laid down in the authorities cited and referred to in that case, and which are also cited, *supra*, in this brief.

And the other, that the only reference to the Act of 1875, is to that act's requiring a court of *its own motion* to dismiss a suit *when it is found* not to be really within its jurisdiction.

Appellees recognize that even though the jurisdictional averments of the bill are *prima facie* to be taken as true, and that thereby plenary jurisdiction was conferred upon the District Court immediately on the filing of the bill, yet if thereafter, at any time, it should appear to the satisfaction of the court that the suit was not properly within its jurisdiction, the court, on its

own inquiry and on its own motion, may dismiss the suit, even if no issue of jurisdiction was raised by the pleadings.

Such a course of procedure is provided for by S. 37 of the Judicial Code, which is but a re-enactment of section 5 of the Act of March 3, 1875, C. 137, S. I. 18, Stat. 470 (U. S. Comp. Stat. 1901, p. 505), referred to by the Supreme Court. That section provides as follows:

“S. 37. If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.”

By its decision in 1907, in *Hunt v. New York Cotton Exchange*, cited *supra*, the Supreme Court has clearly held that this Act of 1875 in no way altered the then long established doctrine or rule as to the *burden of proof on a properly raised issue of jurisdiction*.

Moreover, this Act of 1875 was solely intended to meet and cover a long patent defect in legislation and practice, which prevented the trial court from dismissing a suit for want of jurisdiction, unless a plea to such jurisdiction—if properly alleged in the bill, or otherwise shown in the record—had been actually made and filed in the suit. If such a plea was not made, the court could not dismiss the bill. But by this act the court was empowered to dismiss the bill, at any time, for want of jurisdiction, when “it shall appear *to the satisfaction*” of the said court, that jurisdiction actually and in fact does not exist, and no matter how such fact may be questioned or appear on the record.

But even under this statutory provision, the Supreme Court has laid down a doctrine, and prescribed a rule as to the weight of evidence essential and necessary to justify the court’s dismissal under the statute, which is exactly analogous to the doctrine and rule theretofore laid down and prescribed as to the burden of proof on a formally raised issue of jurisdiction. See:

Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729.

Hartog v. Memory, 116 U. S. 588, 29 L. Ed. 725.

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

In *Barry v. Edmunds*, the complaint contained proper jurisdictional allegations; and a plea was filed to the court’s jurisdiction. The Supreme Court *held* that

when the complaint contains proper jurisdictional allegations, the trial court is not justified in dismissing a cause for want of jurisdiction,

“Unless the facts, when made distinctly to appear on the record, create a legal certainty of the conclusion. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction on this account, shall appear to the satisfaction of said Circuit Court.”

Hartog v. Memory is particularly of importance on the question of what evidence can be considered by the court, as the basis for a dismissal of the bill. In that case, jurisdiction was based on the bill's allegation of diversity of citizenship. The answer contained a general denial. There was evidence tending to show that both parties to the suit were aliens. And the trial court, for that reason, on motion of the defendant, and after verdict, dismissed the cause for want of jurisdiction. In reversing this dismissal, the Supreme Court in its opinion refers to the statute of 1875, and the causes which led to its enactment, and at page 590, says:

“Neither party has the right, however, without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record except by a plea to the jurisdiction or some other appropriate form of proceeding. The case is not to be tried by the parties as if there was a plea to the jurisdiction when

no such plea has been filed. *The evidence must be directed to the issues, and it is only when the facts material to the issues show there is no jurisdiction that the court can dismiss the case upon the motion of either party.*"

And again at page 591 :

"But the evidence on which the Circuit Court acts in dismissing the suit must be pertinent either to the issue made by the parties, or to the inquiry instituted by the court; and must appear of record if either party desires to invoke the exercise of the appellate jurisdiction of this court for the review of the order of dismissal. Barry v. Edmunds, 116 U. S. 550."

In *Wetmore v. Rymer*, the Supreme Court in reversing the dismissal of the bill by the trial court, considers this Act of 1875 in the following language :

"The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such a question, when raised, shall be determined. When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involve a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different states, or when, as in the present case, the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied."

This opinion also further says:

“Applying the law as heretofore stated by this court, in the cases cited (Barry v. Edmunds, and Hartog v. Memory), *that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a legal certainty of that conclusion*, we conclude that, in the present case, the want of jurisdiction was not made clear, and that the evidence before that court did not warrant a dismissal of the action for the want of jurisdiction.”

The record on this present appeal clearly shows that this cause presents not even one of the conditions particularly specified in these decisions of the Supreme Court.

In this suit, no issue was raised by defendants' answer as to the bill's properly alleged diversity in the citizenship of the parties; nor as to the likewise properly alleged jurisdiction of the District Court. In fact, both such jurisdictional averments were formally conceded by defendants.

Defendants made not even a suggestion to the honorable trial court that, in fact, neither diversity of citizenship nor jurisdiction actually existed. Nor did defendants make any motion to dismiss the bill for want or failure of jurisdiction on either of such grounds. Nor did they oppose the making and entry of either the interlocutory or the final decree herein, for either of said causes, although filing and arguing formal written

objections to each and both of said decrees for other particularly specified reasons.

Nor did the honorable trial court institute any inquiry of its own, on any question of jurisdiction.

In other words, in the trial court there was neither an issue of jurisdiction, nor was there any question as to such jurisdiction in any way presented.

The record on this appeal clearly establishes, therefore, that all the parties to this suit not only recognized that the necessary diversity in citizenship was properly alleged and shown in the pleadings and proceedings in the trial court, but also that such diversity actually and in fact existed. And further, also, that the honorable trial court was fully satisfied by the pleadings, and by the proceedings and evidence in that court, that its jurisdiction was properly shown, and clearly established, and that the court's jurisdiction was not questioned or being imposed upon.

Appellees concede that, on the hearing of this suit in the District Court, complainant did not present any evidence to support his allegations in the bill as to the diversity in the citizenship of the parties, in as much as no issue thereon had been raised by defendants' answer, nor any question presented relative thereto.

Appellees, however, further respectfully submit that defendants likewise did not present any evidence to contradict such jurisdictional averments of diversity in citizenship, as they should have done had any issue thereon been raised.

Under the decision of the Supreme Court in *Hartog v. Memory*, cited and quoted *supra*, as there was no issue of jurisdiction raised by the pleadings, nor was there any independent jurisdictional inquiry made by the trial court, nor, in fact, any question as to that court's jurisdiction, any evidence in this suit, which bears on complainant's citizenship, is not, in any way, material or relevant. However, such evidence may properly be briefly referred to, as showing complainant's actual good faith in his jurisdictional averments of the bill; and also that the District Court's jurisdiction was, in no way, imposed upon.

On the hearing in this suit before the District Court, the complainant testified as follows (page numbers refer to the printed record):

"During the times covered by the bill of complaint in this action, I was a member of the bar of the state of New York (p. 92); I was coming to California first in February, 1914, *in connection with some business* (p. 96); I was retained generally to come to California and take charge of any interests which the Pacific Crude Oil Company might determine to look into or go into in this state (p. 90); I came out here on other matters (p. 96); at the annual meeting of the stockholders (of Pacific Crude Oil Company, held in Wilmington, Delaware, in 1915) I was asked if I would return to California and fight this matter through; and while I opposed first, they said they wanted me to come back (p. 96); I left here about the latter part of July (1914), and then went east to New York, etc. Q. (By Mr. Robinson) How long were you there at that time?

A. Where. *At home?* Q. Yes. (p. 99.) Q. (By Mr. Robinson) During that visit east, did you, etc. A. During the time *I was home* at that time, you say? Q. Yes. (p. 100); Q. (By Mr. Robinson) During your visit to the east between— *Mr. Martin* (interrupting): If the court please, I don't think the witness is fairly asked about his visit in the east. I don't think the question is fair because he is not testifying that he visited the east. *That is where he lives.* Mr. Robinson: Well, I think he understands what I mean. (p. 101.) I went right *back home* then (first of year 1919) to New York and Philadelphia." (p. 105.)

It may also be fairly and properly noticed that the assignment of the right of redemption, dated June 11th, 1919, on which this suit is based, and which is in evidence as plaintiff's exhibit No. 8, recites the complainant, William H. Cochran, as "*of the city and state of New York.*"

In discussing such recitals, the Circuit Court of Appeals, Eighth Circuit, in

Rucker v. Bolles, 80 Fed. 504, *held* that

"The fact that a party, in executing legal instruments, described himself as a citizen of a certain state, is evidence to show that at that time he regarded himself as a citizen of the state."

D.

Appellant's Argument on the Jurisdictional Question Here Involved, Is Fallacious in that It Is Based on False Premises, a Misconstruction of the Cases Cited as Authorities, and a Misconception of the Law as to Citizenship.

Appellant's argument assumes that an issue as to jurisdiction has been raised by the pleadings in this suit.

Such, however, is not so, as has been discussed and shown, *supra*. No such issue is raised by the answer to the bill. In fact, the answer expressly admits the jurisdiction of the District Court.

Appellant also asserts that "the denial of the allegation contained in the complaint as to the diversity of citizenship," put the question of jurisdiction in issue.

But appellant points out no such specific denial. Nor can any such denial be found in defendants' answer to the bill. On the contrary, as has been already shown, the answer formally admits not only the bill's properly alleged diversity of citizenship, but also the likewise alleged jurisdiction of the District Court.

That appellant assumes that denial of complainant's properly alleged citizenship in New York, operates also as a denial of the other and distinctly separate allegation of the bill as to diversity in the citizenship of the parties to the suit, is clearly evidenced by appellant's further assertion that, on the thus claimed issue of jurisdiction, "it is incumbent upon the complainant to

prove his allegation of the complaint in reference to the said complainant being a citizen of the state of New York."

As already shown, the only issue raised by the answer, to-wit, whether complainant was or was not a citizen of New York, was an immaterial one, so long as there was no further claim and assertion of such citizenship being in the state of defendants' citizenship, that is California. Proof on an immaterial issue is never necessary; and it is doubtful if a trial court would permit any testimony thereon. In any event, it would not be pertinent to support any claim or question on which no issue has been properly made. See *Hartog v. Memory*, *supra*.

Appellant comments on the fact that both decrees in this suit are silent on the question of complainant's citizenship. And also contends that "There is nothing better settled than that * * * it must affirmatively appear of record that the *court determined and found* that there in fact was a diversity of citizenship."

The *only* case cited in support of this contention is *Roberts v. Lewis*, 36 L. Ed. 582. But that case is far from supporting any such doctrine. And even the quotation from the opinion in that case, which appears in appellants' brief, makes not even such a suggestion. All that was there held was that where jurisdiction depends upon the citizenship of the parties, the requisite diversity of citizenship must be alleged by the plaintiffs and must appear of record. But that is far from

holding that the court must formally and affirmatively determine and *find* thereon in the decree, as argued by appellant.

Appellees concede that where jurisdiction is dependent upon diversity of citizenship, such diversity must be affirmatively and properly alleged in the bill; but that if not so alleged, and yet otherwise appears in the competent evidence, that is sufficient to sustain the court's exercise of jurisdiction. This rule of law is surely so well established and recognized, as to make the citation of authorities superfluous.

Appellees, however, further respectfully submit that there is no rule requiring the court to make any "findings" thereon. See

Liebing v. Matthews, 216 Fed. 1, 12, 132 C. C. A. 245,

where the Circuit Court of Appeals for the Eighth Circuit says:

"There is no rule in equity that the court shall in its decree find all the facts necessary to sustain the decree except where, as in *Peirsoll v. Elliott*, 6 Pet. (U. S.) 95, 8 L. Ed. 332, in the absence of a finding of facts, it would be impossible to tell what the decree in fact meant."

Moreover, in *Roberts v. Lewis*, an action at law, the *pleadings actually raised an issue as to the citizenship* of the plaintiff. And this issue was one of the questions submitted to the jury for determination. But the jury failed to make any finding thereon.

It surely cannot be seriously contended that, even if there were any rule requiring "findings" in a decree—and there is none—it would contemplate findings on immaterial issues, or on matters which were not at issue.

Appellant's brief contains the point (Point 7, A) that the "Burden of Proof was on Complainant." The *only* amplification or explanation which the brief makes of this point, is the statement that "It was incumbent upon the complainant to prove this allegation of the complaint in reference to the said complainant being a citizen of the state of New York."

Appellees have already discussed this sole issue raised by the pleadings; and have also shown that there was no necessity for any evidence thereon.

It is clearly apparent that appellant's entire argument is based on the assumption that denial of complainant's citizenship in New York, raises an issue on the separately and properly alleged diversity in the citizenship of the parties. That such assumption is not well founded, has been already shown.

While appellant's argument on the burden of proof is expressly limited to proof on this alleged New York citizenship, it is also apparent that, inferentially, appellant is also arguing that the separate allegations of the bill as to this diversity of citizenship must be affirmatively proved by complainant, on the false assumption as to the only issue raised by the pleadings.

While appellees do not consider such argument at all pertinent to the real question now under consideration,

they would refer to the two cases cited by appellant, as authority for its contention as to the burden of this proof.

The only cases thus cited by appellant, are *Roberts v. Lewis*, 36 L. Ed. 582, and *Hanchett v. Blair*, 100 Fed. 817, the latter a decision of this Honorable Appellate Court.

Appellees fully recognize that a casual reading of the opinions in these cases would create the impression that they laid down an entirely different, in fact an exactly opposite rule or doctrine as to the burden of proof, than what has been already shown by appellees to have been prescribed by the Supreme Court. A careful study of these opinions shows, however, that this is not so.

Roberts v. Lewis has been so carefully and ably distinguished by the Appellate Courts, and shown not to be in point on this question, that appellees will only cite such decisions. See

Hill v. Walker, 167 Fed. 241, 253, 92 C. C. A. 633;

Toledo Traction Co. v. Cameron, 137 Fed. 49, 53, 69 C. C. A. 28.

It would be presumptuous for appellees to state just what this Honorable Court itself decided in *Hanchett v. Blair*. Appellees, however, feel justified in stating why they do not consider that case as an authority on the question here under consideration.

1. As none of the Supreme Court decisions on this point are cited in that case, it is fairly assumed that this Honorable Court did not consider this same point was before them for determination.

2. As that case—so far as appellees can find—has never been cited by the courts as an authority on this question.

3. As in that case there was a *verified answer* raising the issue of jurisdiction, the effect of which answer was determined and fixed by the then existing rules of practice in equity.

Appellant also presents certain arguments on the evidence in this suit, in connection with this jurisdictional question.

Appellees respectfully submit that, for the reasons already discussed, this evidence is not material to, nor competent in connection with the question of jurisdiction as presented for the first time in this suit, on this appeal.

However, as appellant's argument is directed to complainant's good faith in invoking the jurisdiction of the District Court, and in his allegations in the bill as to the essential jurisdictional facts, appellees will briefly answer such argument, also, however, asking this Honorable Court not to consider such answer as any impairment or waiver of what appellees have herein before already contended for.

It should be particularly noticed that *appellant's brief makes no claim that the evidence proves or estab-*

lishes complainant's residence, domicile, or citizenship in California.

Appellant talks simply of the “*inferences*” and the “*assumptions*” which it says should be drawn from the *testimony* on those questions.

Since when are such important questions as residence, domicile, and citizenship, with their ever attendant questions of personal and property rights, determinable on mere “*inferences*” or mere “*assumptions*”? It certainly is not surprising that appellant's brief fails to cite any decision, or any legal treatise in support of such an astounding contention.

Appellant has also surely overlooked the enunciations of the United States Supreme Court on this very point. *See*

Barry v. Edmunds, 116 U. S. 550, 29 L. Ed. 729,

where the Supreme Court says:

“It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, ‘shall appear to the satisfaction of said Circuit Court’.”

Like language is found in

Wetmore v. Rymer, 169 U. S. 115, 42 L. Ed. 682.

The only pertinent inquiry on this question of jurisdiction is "*was complainant a citizen of California*" at the time his bill in this suit was filed?"

Appellees respectfully submit that, aside from the contrary allegations of the bill, the testimony in this suit—which is also immaterial on this question—fails to justify even an inference or an assumption that complainant was then a citizen of California. Nor that complainant had even any permanent residence or domicile in that state.

The testimony in question is confined to what was given by complainant himself.

There are certain features of that testimony, which are particularly pertinent to the question under consideration, and to which appellees would particularly direct attention. They are as follows:

Complainant was a member of the bar of the state of New York; first came to California in February, 1914, "*in connection with some business*"; and as he was coming out here on other matters, the persons who subsequently organized the Pacific Crude Oil Company, also retained him, as attorney, to purchase the property involved in this suit, as he subsequently did; that he "*went home again*" in July, 1914. That complainant then certainly had no intention of returning to California, is evidenced by his testimony as to what oc-

curred after the commencement of the suit in which the judgment here involved was entered. On this complainant testified [Record, p. 96]:

“At the annual meeting of the stockholders (of Pacific Crude Oil Company) in January, 1915, *I was then asked* if I would return to California and fight this matter through; and *while I opposed first, they said they wanted me to come back, and that I should return here (California)* and do whatever I thought was best * * * so that the property would not be lost to them.”

Pursuant to this retainer, and for the purpose only of the business thereof, complainant returned to California in May or June, 1915, where he remained until January, 1919 (incorrectly stated in record as 1918), when he “*went right back home.*” [Record, p. 105.]

It will also be particularly noticed that whenever complainant testified about leaving California, he always likewise testified that he was “*going home.*” The importance of this is particularly emphasized by the fact that while appellant’s counsel invariably framed his questions about complainant’s “visits to the east,” complainant likewise invariably answered by asking counsel if by such question he meant complainant’s “home.” To which inquiry, counsel invariably answered “Yes.” This point is even more particularly emphasized by the testimony which appears on page 101 of the record, as follows:

“Q. (Mr. Robinson) During your visit to the east between—

Mr. Martin: If the court please, I don’t think the witness is fairly asked about his visit in the east. I

don't think the question is fair, because *he is not testifying that he visited the east. That is where he lives.*

Mr. Robinson: Well, I think he understands what I mean."

What did counsel mean? Did he mean that he recognized that there was no issue nor question of diversity of citizenship? Or did he mean that he did not want to try out any such question in the trial court, but reserve it to be sprung in the Appellate Court, if the suit should be decided against defendants?

In any event, appellees respectfully submit that there is no testimony creating an inference, let alone "*a legal certainty*" that complainant was a citizen of California, or was even *permanently* resident or domiciled therein.

"Mere residence may be for a transient purpose, as for business, for a fixed period, or limited by an expected future event, upon the happening of which there is a purpose to return or remove."

"To constitute citizenship of a state in relation to the judiciary acts requires—First, residence within such state; and Second, *an intention that such residence shall be permanent.* In this sense, state citizenship means the same thing as domicile in its general acceptance. *The act of residence does not alone constitute the domicile of a party, but it is the fact of residence, accompanied by an intention of remaining, which constitutes domicile.* The distinction between domicile and mere residence may be shortly put as that between residence *animo manendi* and *animo revertendi.*" (Cases cited.)

Marks v. Marks, 75 Fed. 321,

"A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests on the person making the allegation. To constitute a new domicile two things are indispensable:

*First, residence in a new locality; and Second, the intention to remain there. * * * Both are alike necessary, either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change."*

Mitchell v. United States, 21 Wall. 350, 353, 22 L. Ed. 584, 588.

SECOND POINT.

Defendants Having Failed to Present to the District Court Any Question of Its Jurisdiction Over This Suit, the Defendant-Appellant Is Precluded From Raising or Presenting Any Such Question, on This Appeal.

This question of jurisdiction as presented on this appeal by defendant-appellant for the first time in the cause, must also be considered from another aspect. That is, the effect and result of defendants' failure to raise such question in the trial court.

Defendants did not present any issue of jurisdiction by their answer to the bill; nor did they ever during the protracted proceedings in the suit in the trial court, even suggest, let alone claim, that there was any ques-

tion or doubt about the court's jurisdiction; nor did they ever make any motion for a dismissal of the bill, or for any order or decree, based on any want or failure of jurisdiction. The question of jurisdiction is presented for the first time in this case, on this appeal.

Appellant now presents the question by its assignments of error numbered 63, 64 and 65. The substance of 63 and 64 is that the court "had no jurisdiction," and consequently erred "in making, in rendering and in entering the final decree and interlocutory decree in this cause." Number 65 assigns error to the court's not decreeing that it had no jurisdiction on the ground that the "evidence was insufficient to show" the necessary diversity of citizenship of the parties. [Record, p. 532.]

And yet, defendants made no motion to dismiss the bill on any such grounds; nor did they at all oppose the making of either of said decrees for any such reason, although filing and arguing other formal objections thereto. [See "Specifications of Reasons," Record, pp. 368 and 489.]

Appellees contend and respectfully submit that the defendants having thus failed, during the hearing of the suit in the trial court, to raise or present any question of jurisdiction, the defendant-appellant is now precluded from raising any such question on this appeal.

In *Hill v. Walker*, 167 Fed. 241, 92 C. C. A. 633, the issue of jurisdiction actually was raised under a general denial; such evidence as was adduced tended to support the allegations of the complaint as to the citi-

zenship of the parties; but no motion challenging the jurisdiction, was made in the trial court; the question of jurisdiction was first raised on the appeal.

The Circuit Court of Appeals, Eighth Circuit, in that case sustained the jurisdiction of the lower court, as the question had not been there directly raised. In its opinion, the court, on this point, says, in part, as follows:

“Here the jurisdictional facts are properly alleged in the complaint, and there is no showing in the evidence which can create even a suspicion of fraud upon the jurisdiction of the court, and *the objection is raised in an Appellate Court by a defeated party who presented the issue obscurely under a general denial and refrained from directly raising the question in the trial while he speculated upon the result of the litigation.* Under such circumstances, surely, this court is not justified in reversing the judgment when there is a general finding supporting jurisdiction.”

In that case, it should be noticed that an issue of jurisdiction was actually raised by the pleadings; but the question of jurisdiction was not directly raised on the trial.

In the present case, there was neither an issue on, nor a raising of the question of jurisdiction, in the trial court.

Amongst the cases decided by the Supreme Court, and which were cited as authorities by the Appellate Court in the opinion in *Hill v. Walker*, is *Hartog v.*

Memory, 116 U. S. 588, 6 Sup. Ct. 521, 29 L. Ed. 725. In discussing that case, the Circuit Court of Appeals says:

“The case of *Hartog v. Memory* is an unqualified holding that *any lack of evidence to support the jurisdictional averments of the complaint must be challenged in the trial court, and can not be raised for the first time on appeal; and it further holds that, in order to justify a dismissal by the trial court for want of jurisdiction, the evidence material to that subject must show directly and affirmatively that there is no jurisdiction.* This case has never been overruled; nor has it been in any way qualified except as we shall presently point out. On the contrary, it has been referred to as a controlling authority as frequently as any decision of the Supreme Court dealing with the subject of jurisdiction.” (Numerous cases are then cited.)

See also,

DeSobry v. Nicholson, 3 Wall. 20, 18 L. Ed. 263, where it was held that

“*No exception can be considered here which was not taken in the court below. Stoddard v. Chambers*, 2 How. 285; *McDonald v. Smalley*, 1 Pet. 620.”

In *Livingston's Executrix v. Story*, 11 Pet. 351, 368, 9 L. Ed. 746, 753,

the appellees were held to have the right to raise the question of jurisdiction, on the appeal, *but solely upon the ground that “jurisdiction was denied in the District Court, and evidence given upon the question.”*^

The record on this appeal shows that the suit was vigorously contested in the trial court, on every possible point of fact, of law, of equity, and of technicalities, and yet not even a suggestion of any jurisdictional question. Defendants served, filed and argued formal written "Specifications of reasons for not approving proposed interlocutory decree"; and also like specifications as to the proposed final decree. And yet not one word as to jurisdiction.

Why this silence in the trial court, if that court, in fact, was without jurisdiction over the suit? Is it not because defendants' active and able counsel well knew not only that there was no issue as to the court's jurisdiction, but also that the pleadings and the record in the suit legally established the necessary diversity in the citizenship of the parties, and the resultant jurisdiction? Otherwise, why was the want or failure of jurisdiction, which is now on this appeal claimed for the first time, not presented and claimed in the trial court? Most assuredly that was the proper place, before any decree was entered, to have lawfully, equitably, and in all fairness to that honorable court and to the opposing counsel, to have had the question, if there was any, presented and disposed of. Every other possible and impossible point and question was there raised, presented and passed upon. If defendants did not then well know that jurisdiction actually existed, and considered that there was a want or failure of jurisdiction, what was the ulterior motive that kept back the raising of this question until the case reaches this Appellate Court?

The record in this case shows that defendants have not presented one single meritorious defense, or a single claimed defense to the merits, which is not purely and simply a technical one. Is it not fair to assume that the question of jurisdiction as now for the first time raised by appellant, is but a continuation of the technical procedure pursued by defendants not only on the hearing before the trial court, but also in the proceedings before the special master? And all in the so far vain endeavor and hope to ignore the legal and equitable merits of the suit; and, through some such technicality, to defeat or at least to hinder the enforcement of the law and the equity of complainant's just claims?

An exactly similar course was commented on and severely condemned by the Circuit Court of Appeals in *Hill v. Walker*, cited, *supra*, where that Honorable Court (opinion, p. 256) says:

"The practice here advocated simply requires that frankness toward opposing counsel and that candor towards the court which at the present time is fundamental to the procedure of all English-speaking communities. It imposes no burden except that of raising an objection directly and clearly in the court where it can be met with the least trouble to courts and the least expense to litigants. The other practice, on the contrary, authorizes clandestine pleadings and captious practice; the keeping of an objection in ambush for the purpose of speculating upon the result of the trial, and then, if that result is unfavorable, bring-

ing the objection forward for the first time in an appellate court, where it will result in the greatest loss of time to the courts themselves, and the greatest expense to the litigants, and make a mockery of justice in the judgment of all men outside of the legal profession.”

As already said, the Appellate Court overruled the plea, and sustained the jurisdiction of the trial court.

THIRD POINT.

Neither the Judgment Debtor, Pacific Crude Oil Company, Nor Its Assignee, the Complainant Herein, Has Been Guilty of Laches in the Bringing of this Suit.

Appellant's brief presents the question and defense of laches in the bringing of this suit. The grounds for this claimed laches are stated as follows (brief, point 8):

“The complainant or his assignor, having for a period of sixteen months after the expiration of the period of redemption taken no steps to redeem, is precluded from maintaining this action by reason of laches.”

This very same question and defense was presented to the honorable trial court, on the hearing of this suit.

The scathing opinion of the learned district judge in overruling this defense will be found at page 129 of the record. That opinion is well worthy of repetition and of consideration, before taking up the consideration and

discussion of the here renewed and repeated arguments of appellant. The learned district judge then said:

“And what is *the defense* here to this suit? It is not the statute of limitations, but a *defense of laches*. *That is the only defense I see that is presented here.* And upon what is that defense founded? *It is founded upon the wrong of the defendants in failing to give the statement.* Even if the statement had been made at the time of this proceeding against the sheriff of Ventura county, it might have been said then to be the right of the plaintiff to get busy and bring suit, but *as long as the defendant was in the wrong I do not see how the defendant could complain that the plaintiff did not ask and compel it to make an accounting.* Why should any man whose duty it is to make an accounting complain because somebody does not sue him? *That is really the gist of the thing.* The defendant has been claiming here that the plaintiff did not sue the defendant soon enough; not soon enough by virtue of any statute of limitations, but the appeal is made to a court of equity that this action ought not to be maintained, because, *forsooth, the plaintiff has not sued the defendant soon enough because the defendant had committed a wrong.* Now I do not think any right ought to be founded upon a wrong, and that is what this is, in my opinion.”

Appellant's argument is unquestionably based on the assumption—which is an absolutely incorrect interpretation of the law—that laches necessarily arises from mere lapse of time. This is clearly evidenced by

the heading or statement of the point (point 8) on this question, in appellant's brief, as fully quoted *supra*.

The versatility of appellant's arguments and contentions is most marked by its argument on this point. For while it now claims laches because of the lapse of some sixteen months between the expiration of the ordinary period for redemption, viz., twelve months, and the commencement of this suit, on its formal motion to dismiss the bill herein, and on the hearing of this suit, appellant claimed laches in complainant's delay in bringing this suit for ten months after the execution of the sheriff's deed to the real property here involved. [Record, p. 30.] And further, while its point (8) is expressly directed to the time subsequent to the expiration of the ordinary period for redemption, appellant's argument also covers the prior period.

Appellant's argument contains numerous statements about the facts in this case; of conclusions as to what facts are and are not shown by the record; and also as to the statutes and the law applicable thereto.

Appellees regret being obliged to say that such statements are most inaccurate, and are not supported by the record, nor by the law—and more particularly the statutes—applicable thereto.

I.

THE FACTS IN THE CASE.

Appellant comments on Cochran's ignoring defendant-appellant's demand that he show his authority to redeem by "even, if necessary, going to Delaware and procuring a proper evidence thereof."

When it is recalled that Cochran, as attorney for Pacific Crude Oil Company, in March, 1914, had negotiated and concluded the purchase from this defendant-appellant of the very property involved in this suit; and that in all the frequent and subsequent matters and negotiations in connection therewith, up to the time of this written demand on March 1, 1918, appellant and its attorneys—who are the original solicitors of record in this suit—had always dealt with Cochran as such attorney, and had invariably recognized him to be such, the captiousness of the belated demand for proof of his authority, is manifest. As this matter will be fully discussed later in this brief, it will be now passed with the single further remark that the evidence clearly shows that this demand of proof of authority is but one of appellant's many stealthy but futile attempts to procrastinate until the twelve months within which redemption could be made, had expired.

Appellant also further states in its brief that "the evidence shows that *nothing* whatever *was done* by complainant or the judgment debtor, other than the preparation and service of said alleged demand, for the purpose of protecting or enforcing the right of redemption, until July 3, 1919, when this suit was commenced."

The testimony of Mr. Cochran—together with the exhibits marked in evidence in connection therewith—which appears on pages 122 to 125 of the record, and which was expressly admitted "to show the activities and to rebut the evidence on the question of laches," is

an unqualified contradiction of this assertion in appellant's brief.

The length of that testimony precludes its quotation in this brief. However, the salient features thereof may be briefly recited. And they are that "*shortly after the sale of the property on March 3, 1917, I (Cochran) took up with Dr. Mills (appellant's secretary and treasurer) the question to see what could be done with the whole situation, and we discussed that for several weeks, and probably it ran into months, and there were various propositions pro and con, but we never seemed to be able to arrive at any conclusion as to what should be done.*"

Is all this "*nothing*" within appellant's contemplation? And does not this show expedition in an endeavor to protect the right of redemption?

What does appellant mean? Certainly no suit could then have been brought. And what better, or in fact, what other way was then open to effect redemption, than by negotiations and discussions with the purchaser, as to what should be paid to it for such redemption?

"*Toward the fall of 1917,*" when the testimony clearly shows that Cochran realized that negotiations were futile, and that the time to redeem was fast running, *he told appellant's secretary and treasurer (Dr. Mills) that he (Cochran) "would like to have a statement of just what moneys they (appellant) had received from the property and what the expense had been so that I (Cochran) would know just what mon-*

eyes were necessary to redeem it." (Record, p. 122.) And Cochran asked such statement not once, "but several times"; and it was likewise several times promised to him, by appellant.

It is impossible to read the unquestioned testimony of Mr. Cochran, without a full appreciation of the paltry excuses which were then being made by appellant's secretary and treasurer, for the delay in delivery of this promised statement. As treasurer, Dr. Mills had paid all the bills in connection with appellant's operation of this property. Why, therefore, could he not have made up the promised statement? Why this reference to Hornada,—another of appellant's stockholders and directors—who was in charge of the property? For no other reason than delay, as March 3, 1918, was every day coming nearer.

And can appellant properly still say that all this was "*nothing*"? And still no suit was possible. Or does appellant mean that Cochran should not have accepted of nor relied upon its secretary-treasurer's several promises of the written statement? It may also be fairly commented upon that not one of appellant's officers, directors or stockholders was called as a witness on the hearing of this suit. Cochran's testimony stands both undisputed and unquestioned.

March 3, 1918, is still nearer; and still no statement. So on January 21, 1918, and immediately after another personal interview with Dr. Mills, in which there were some vague and uncertain promises as to the delivery of the promised statement, Mr. Cochran wrote

Dr. Mills very fully on the subject, and renewed his request for a statement. This letter is in evidence as "Plaintiff's Exhibit No. 10." (Record, p. 576.) IT SPEAKS FOR ITSELF.

And what answer does Cochran receive? Nothing but a reference of the whole matter to appellant's attorney. (Plaintiff's Exhibit No. 11, Record, p. 578.)

First the matter was put up to Hornada. Now it is put up to appellant's attorney. If this Honorable Court will pardon the expression, appellant was always "passing the buck."

And then this attorney says to Cochran, "Show me your authority."

Cochran answered this captious letter by, on March 1, 1918, serving the formal written demand for a statement of rents and profits, as required by the statute.

Negotiations had failed; appellant's oft repeated promises had been likewise repeatedly broken; and no recourse was left to the judgment debtor, if it would protect its right of redemption, than to follow out the strict letter of the law.

Does not the evidence clearly show to whom and for what purpose the postponement of the institution of formal legal proceedings is really attributable? Can it be doubted that appellant purposely prolonged negotiations? Deliberately made promises which it never intended to perform? And wilfully procrastinated in every possible way, and on every possible excuse and technicality, to prolong this whole question until after March 3, 1918?

And even after appellant received the formal written demand for a statement of rents and profits, does it comply with such demand? Not at all. It ignores and refuses the demand. If appellant had given the demanded statement, appellant must have been paid the required redemption money within five days thereafter. Appellant's refusal of such demand, necessitated the bringing of this suit, which can be attributed solely to appellant's wilful and inequitable conduct. (California Code of Civil Procedure, Sec. 707.)

Appellant instituted two special proceedings in the California Superior Court of Ventura county, for a mandate requiring the sheriff of that county to execute and deliver to appellant, as purchaser at the execution sale of March 3, 1917, a deed of the real property involved in this suit. The sole other party to both these proceedings was that sheriff. The first proceeding was instituted in March, 1918, and the writ was denied by the court. The second proceeding was instituted in July, 1918; and it was pursuant to the mandate granted therein, that the sheriff executed and delivered the purported deed which had been declared void by the decree in this suit.

Appellant says that while they had knowledge of the pendency and prosecution of these proceedings, "*No attempt was made by complainant or the judgment debtor to intervene in said mandate proceedings.*" (Referring to the first proceedings.)

If by this statement appellant means simply that neither complainant nor the judgment debtor filed any formal petition to intervene, then that is true.

But if that statement is intended to convey the impression to this Honorable Court, that neither the judgment debtor nor Cochran as trustee made "no attempt" of any kind to become parties to that proceeding, then the statement is far from true.

The evidence shows that *Cochran* as attorney for Pacific Crude Oil Company, and also as trustee, *voluntarily appeared in court on the hearing of this proceeding: and that appellant's attorney herein, formally and forcibly objected to Cochran's being made a party to the proceeding, and also even to his being heard by the court. Consequently, Cochran was not heard in that proceeding, nor was he made a party thereto.*

In this connection, this Honorable Court's attention is particularly asked first to Mr. Cochran's letter of March 30, 1918, to the Honorable Merle J. Rogers, the judge before whom this first mandate proceeding was heard. (Defendant's Exhibit A, Record, p. 582.) A letter written in the most unusual manner as "*amicus curiae*" in Mr. Cochran's efforts to protect this right of redemption.

Does not this letter show an "attempt," even if not strictly formal, to intervene, or at least to be made a party, in that proceeding?

The result of this letter was an adjournment of the hearing of the proceeding. Mr. Cochran's testi-

mony as to what transpired in court on that hearing, is most enlightening on appellant's attitude in any and everything in any way associated with the property involved in this suit. Mr. Cochran testified (Record, p. 118) that he was requested by the sheriff's counsel to address the court on the matter; and that he was presented to the court, for that purpose. Mr. Cochran then further testified as follows:

"I started to address the court on the matter, and *immediately Mr. Cates, who represented the petitioner, Big Sespe Oil Company, one of the attorneys here, rose and objected to my speaking or addressing the court on the ground, first of all, that neither the Pacific Crude Oil Company nor myself as trustee were parties to that proceeding. He objected to us being made parties, and he objected to us being heard at all at that time, and Judge Rogers said, of course, if we were not parties, and Mr. Cates stood on that ground, he could not very well extend courtesies any longer, and therefore I was obliged to sit down, and Mr. Bowker (the sheriff's counsel) took the matter up from that time on.*"

And yet appellant says "*nothing was done*"; and that there was "*no attempt to intervene*" in this proceeding.

The courtesy and legal acumen then displayed to Cochran, certainly did not call for any or at least no further efforts from him in the second proceeding, than is shown by his letter in connection therewith, to the sheriff's counsel (Defendant's Exhibit G, Record, p. 595). And yet appellant asks why there was no attempt to intervene in the second mandate proceeding?

Appellees fully recognize the maxim quoted in appellant's brief that "Ignorance of the law is no man's excuse." But they consider that appellant's application thereof to Mr. Cochran's efforts in these mandate proceedings, is, to say nothing more, ill-founded. It is more appropriately applicable to the conduct of those proceedings by appellant's attorneys therein.

It surely is well settled doctrine that *no man is bound to intrude* himself into pending litigation, even if some of his rights or interest may be in some way involved therein.

It is also equally well settled that if one would litigate the rights or interests of another, and would have such other person bound by the judgment thereon it is *absolutely essential* that the other person should be made a party to the litigation.

In his letter to Judge Rogers, Mr. Cochran strenuously objected to the hearing of these mandate proceedings, "*without notice to the real parties in interest*" (Record p. 585).

On the hearing, appellant's attorney objected not only to Cochran's being heard, but objected *also to his being made a party* to the proceeding, claiming that he had no interest or right therein.

Appellant's forgetfulness as well as the versatility of its arguments and contentions, is again marked by the statement in appellant's brief that, "*The judgment debtor was the real party in interest, and the party most vitally concerned with the issues then pending before the Superior Court*" (the mandate proceed-

ings). And appellant then asks, why, therefore, the judgment debtor did not seek to intervene in those proceedings?

Appellees would ask, *Why did not appellant make the judgment debtor a party to those proceedings, as it concededly was "the real party in interest"?* As appellant says, "Ignorance of the law is no man's excuse."

Appellees respectfully submit that the evidence unquestionably establishes that neither the judgment debtor nor complainant has been negligent or slothful in the preservation, or in the attempt to effect this right of redemption.

The lapse of time between the service of this demand, and the commencement of this suit—so far as this question of laches is concerned—will be covered by the law which will now be considered.

II.

MERE LAPSE OF TIME, BY ITSELF, DOES NOT CONSTITUTE LACHES.

That a mere lapse of time, by itself, does not constitute laches, is such a well established principle of law and equity, that it would seem almost presumptuous to cite authorities in its support. But see, *Bartlett v. Ambrose* (C. C. A., 4th Circuit) 78 Fed. 839, where the court *held*,

"Whether a party has lost his right to come into a court of equity does not depend upon the lapse of time, but upon the question whether,

during this time, such changes and circumstances have taken place as made it inequitable to recognize the claim of the party asserting title."

This case also cites and follows:

Alsop v. Riker, 155 U. S. 461, 39 L. Ed. 223;
Galliher v. Cadwell, 145 U. S. 368, 36 L. Ed.
738.

In Alsop v. Riker, the Supreme Court says:

"The length of time during which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule. *It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to these rights such, that it would be inequitable to permit the plaintiff to now assert them.*"

And again in Galliher v. Cadwell, the like doctrine is laid down as follows:

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

These cases were also cited and followed in

Hanchett v. Blair, 100 Fed. 817,
which is a decision of this Honorable Court.

III.

THERE CANNOT BE ANY CLAIM OF LACHES IN THE BRINGING OF A SUIT, WHEN IT IS COMMENCED WITHIN THE TIME FIXED BY THE STATUTE OF LIMITATIONS.

It is provided by section 707 of the California Code of Civil Procedure, that, if the purchaser shall fail or refuse to give the statement of rents and profits also demanded in accordance with the other provisions of that section, the

*“Debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such * * * debtor.”*

There are two important and absolutely distinct features thus provided for. *First*, the right of action for an accounting; and *second*, the extension of the ordinary period of twelve months, within which redemption may be made.

In the case at bar, the judgment debtor, in due season, made the written demand required by this section; and defendant-appellant failed to give the statement thus demanded. Consequently, the right of action for an accounting was given to complainant. And this suit accordingly was instituted. Moreover, by such refusal of this demanded statement, *complainant's time to redeem has been extended until fifteen days after the final determination of this suit.*

It assuredly cannot be seriously contended that the time thus expressly given by the statute, for redemption, can be at all abbreviated by any postponement in the bringing of the action for an accounting, so long as such action is brought within the time limited therefor by the statute of limitations.

There is no federal statute of limitations applicable to this suit. Consequently, the California statute of limitations is applicable and controlling. For, as was said by this Honorable Court in *Hanchett v. Blair*, 100 Fed. 817, at page 826:

“The statutes of limitation of actions, as enacted by the legislatures of the different states, are steadfastly followed by the courts of the United States as rules of decision in cases where they apply. Bauserman v. Hunt, 147 U. S. 647, 37 L. Ed. 316; Campbell v. City of Haverhill, 155 U. S. 610, 39 L. Ed. 240. And the rule is well settled that the laws of the former govern the plea of the statute of limitations.”

These statutes of limitations are as applicable to suits in equity, as to actions at law.

See:

Norris v. Haggin, 28 Fed. 275, 278,

which cites in its support:

Badger v. Badger, 2 Wall. 94;

Case of Broderick's Will (California case),
21 Wall. 518;

Miller v. McIntyre, 6 Pet. 66;

Piatt v. Vattier, 9 Pet. 415.

In the Norris case, which was decided by Judge Sawyer in the Circuit Court, District of California, the learned judge says:

“Upon a full consideration of the authorities, the established rule to be deduced from them appears to be that in those states where the statutes of limitations are made applicable to suits in equity as well as to actions at law, where they embrace in terms the specific case, and in case of concurrent jurisdiction, they are, in themselves, as obligatory upon the national courts of equity, as such, as they are upon the state courts, and as they are in actions at law, and the court should act in *obedience*, rather than *upon analogy*, to them; but where they are not applicable to equity cases in the state courts, and there is not concurrent jurisdiction, or the specific case is not covered in express terms by the statute, then the statute of limitations will, ordinarily, be applied by analogy, in accordance with the provisions of the statute most nearly analogous and applicable. *In this state (California) there is a statute applicable to every case that can arise, and the statutes are as applicable to cases in equity as to cases at law, and the national courts of equity should, therefore, yield obedience and give effect to them as such.* Lord v. Morris, 18 Cal. 486; Crattan v. Wiggins, 23 Cal. 34; Hardy v. Harbin, 4 Sawy. 548. But it can make little difference which theory is adopted, as the practical result is the same whether the court acts in obedience to the statute as obligatory upon it, or adopts the statute by analogy, in pursuance of the settled principles of equity law, and the long-established rules of equity practice, equally obligatory upon the courts.”

Appellant says that the California Code does not specify the particular time within which this action

for accounting should be brought. And argues that, consequently, the action "should be brought within a reasonable time."

Aside from the fact that any such construction of the statute would usually operate as a curtailing of the statutory period for redemption, the California code does prescribe a limitation for actions for accounting.

The time for the commencement of actions in California, is limited and prescribed by the Code of Civil Procedure of that state. There is no particular provision as to actions for accounting. However, by section 343 of that code it is provided as follows:

"An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

That actions for accounting are within this four-year limitation is expressly *held* in

Alsop v. Josua Hendy Machine Works, 5 Cal. App. 228,

which also approvingly cites

West v. Russell, 74 Cal. 545, 16 Pac. 392.

In asking denial of this plea of laches, on the grounds presented, appellees would also urge that the defense of laches is not generally of such a meritorious character, as warrants any court, either of law, or of equity, to recognize and sustain it, unless the claimed laches is clearly and unquestionably proved and established. To do otherwise, would turn its equitable purposes into inequitable injustice. The language of the

Supreme Court of California in discussing such a defense is well worthy of repetition. In

Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077,

that court says:

“That doctrine (of laches), as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. *It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice.* It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent. * * * *but it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong.*”

Is not this language particularly pertinent to this appellant?

FOURTH POINT.

The Judgment Debtor, Pacific Crude Oil Company, Before the Expiration of the Time Allowed for the Redemption Here in Question, Duly Demanded in Writing of the Judgment Creditor and Purchaser at Said Execution Sale—the Defendant Big Sespe Oil Company—a Written and Verified Statement of the Amounts of Rents and Profits Which It Had Received From the Property in This Suit.

An intelligent presentation and understanding of this point, and of the various arguments and contentions

which may be advanced thereon by either party, require consideration of the statutes on which the statement in question is founded.

The redemption sought to be enforced in this suit, and the attendant disclosure and accounting herein, are both creatures of the statutes of the state of California. And as such statutes will be frequently cited and referred to, it seems well to here set forth the same at length, that this Honorable Court's examination thereof may be facilitated.

CALIFORNIA STATUTES REGULATING REDEMPTION.

Redemption from sales under execution, in California, are regulated by the Code of Civil Procedure of that state. The pertinent provisions of that code are as follows:

“Sec. 702. The judgment debtor * * * may redeem the property from the purchaser any time within twelve months after the sale on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest on such amount.”

“Sec. 707. The purchaser, from the time of the sale until redemption, * * * is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

“But when any rents or profits have been received by the judgment creditor or purchaser * * * from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption money to be paid: and if the * * * judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, * * * a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser * * * to such * * * debtor.

“If such purchaser * * * shall, for a period of one month from and after such demand, fail or refuse to give such statement, such * * * debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such * * * debtor.”

The demand here in question was made pursuant to this section 707. And as the thus demanded statement was refused by the defendant, this suit was brought, *inter alia*, “to compel an accounting and disclosure,” as by said section 707 is also provided for.

The sale here involved was had on March 3, 1917. This written demand having been made on March 1, 1918, was made within the “twelve months” limited for redemption (Cal. Code Civ. Pro. Sec. 702). Con-

sequently, appellant's points and arguments as to the demand, must be confined to the form and sufficiency thereof.

I.

THIS WRITTEN DEMAND FOR A STATEMENT OF RENTS AND PROFITS, WAS THE DEMAND OF THE JUDGMENT DEBTOR, PACIFIC CRUDE OIL COMPANY: AND WAS PROPERLY AND LEGALLY MADE.

The bill, paragraph "Twelfth" (Record, p. 13) alleges that the defendant, Big Sespe Oil Company, was duly served with and actually received such a proper written demand, in due season, to-wit, on March 1, 1918.

Defendants' answer also formally admits that a copy of this written demand "was delivered to defendant on March 1, 1918." (Record, p. 59.) And a like admission was made by defendants, on the hearing of the cause. (Record, p. 84.)

While defendants admit in their answer, the receipt on March 1, 1918, of a copy of this written demand (Record, p. 59), they likewise also deny that such demand was the act of the judgment debtor, also alleging that the same "is of no effect and void." (Record, p. 78.)

The grounds of such denial and allegation, as set forth in the answer, may be summarily stated as follows: That the judgment debtor could not acquire or convey any "legal title to any real property" within California, nor could any person transact any busi-

ness in said state, on the judgment debtor's behalf, all because that debtor had not registered in California, as a foreign corporation. And also further, that the demand "was not signed or executed by the Pacific Crude Oil Company" by any proper authority; and that William H. Cochran, who signed this demand as attorney and otherwise, for the debtor, was not authorized so to do. (Record, p. 78.)

The particularly assigned errors in connection with this demand are numbered 13, 14 and 15 (Records, p. 517.) In substance, they are (13) that the debtor did not make this demand, (14) that it was not made by or with proper authority; and (15) that it was not in due and legal form.

A.

The Signing of This Demand in the Name of the Judgment Debtor by Its Attorney, Was Sufficient; and Made Such Demand the Act of the Debtor, as Said Attorney Was Fully Authorized to Make the Same.

This written demand (Record, p. 27) was signed as follows: "Pacific Crude Oil Company, by William H. Cochran, its attorney"; "William H. Cochran as trustee for Pacific Crude Oil Company"; and "William H. Cochran."

These two latter signatures would not here receive any consideration, were it not for the comments made thereon by appellant. It will, however, suffice to say that, as the record shows, the property involved in

this suit, had been previously deeded to Cochran as trustee mentioned. And, in order to avoid any question as to whether Cochran held the legal title, as an individual or as trustee, and also to avoid any question as to the sufficiency of the signatures—because this legal title was thus outstanding—these two signatures were added to that of the judgment debtor. So we may pass to consideration of the sufficiency and authority of the signature by the attorney for the debtor.

As a general proposition, it surely cannot seriously be questioned but that corporations can act, in any matter, only through and by their duly accredited officers, agents and attorneys, in the corporate name, and on its behalf.

The unquestioned evidence shows that Cochran was a member of the bar of the state of New York, at all the times mentioned in the bill, was formally retained by Pacific Crude Oil Company, as its attorney, even before the company was actually incorporated; that he came to California for these clients in February, 1914; then negotiated with defendant-appellant, and completed the purchase from it, and for his clients, of this real property; and that during the immediately succeeding years he was in frequent personal contact and communication with defendant and its attorneys, who are the same attorneys who appeared and answered in this suit, for the defendants, and that both parties always knew, recognized and dealt with him as attorney for this judgment debtor; and more par-

ticularly, that, as such attorney, and after the execution sale of March 3, 1917, and up to the time of the making of this demand, he conducted continuous negotiations with defendant, for an adjustment of the differences between defendant and the judgment debtor. (See Cochran's testimony, Record, pp. 86 to 105, and pp. 122 to 125; also Plaintiff's Exhibits Nos. 9 and 10, Record, pp. 575, 576.)

That Cochran not only was the judgment debtor's attorney-at-law, but also was so recognized and dealt with by appellant, for some four years prior to March 1, 1918, is clearly established by the evidence.

Cochran's unquestioned testimony also shows that he was fully empowered and authorized to make this demand. That portion which appears on pages 96 and 97 of the record, is particularly pertinent. After testifying that while he was at home—in New York—in December, 1914, he was served with the summons and complaint in the action wherein the judgment under which this execution sale was had, was entered, Cochran continues:

"I immediately took the matter up with the officers and directors (of Pacific Crude Oil Company) and also at the annual meeting of the stockholders in January, 1915, and I was then asked if I would return to California and fight this matter through; and while I opposed first, *they said they wanted me to come back, and that I should return here and do whatever I thought was best not only in legal proceedings but otherwise so that the property would not be lost to them. Otherwise I had no detailed instructions as to*

*how I was to carry it out, and I was to use my best judgment as to the ways and means of protecting that property against loss because of this suit, and I kept them informed from time to time by correspondence and letters, and when I returned East, I again conferred with the various officers and directors and stockholders personally, and they knew fully what I had done and approved of it in conversation; * * ** I had the absolute direct approval from everyone of the officers and directors and every one of the stockholders with whom I talked.”

And yet appellant would here question Cochran's authority to sign this demand as “attorney” for the judgment debtor.

The learned trial judge in his oral decision on the hearing of this suit, forcibly expressed his views on the captious attitude of the appellant in demanding proof of Cochran's authority to make this demand, and also on appellant's refusal to deliver the demanded statement (Record, p. 129), as follows:

“I cannot see any reason for the Big Sespe Oil Company demanding from him (Cochran) his authority or saying that they would give an accounting to the Pacific Crude Oil Company if proper authority was presented by Cochran in demanding it. I am inclined to think the Big Sespe Oil Company ought not to have been so technical. Their conduct in refusing that statement does not appeal to this court as being conduct in a spirit of fairness at all. However, I am thoroughly of the opinion that this demand was legally and properly made, and a statement should have been delivered. Right and justice required it, and the stat-

ute demanded it. No statement was delivered. It was the duty of the Big Sespe Oil Company to make this statement.”

B.

The Legal Existence of the Judgment Debtor, Pacific Crude Oil Company, Was Not Terminated by the Forfeiture of That Company's Charter: but, on the Contrary, That Company Was Continued After Such Forfeiture, for the Term and for the Purposes Specified in the Delaware Statutes. And All the Pertinent Times and All the Pertinent Matters Involved in This Suit, Were Within Such Statutory Provisions.

In their answer to the bill of complaint, defendants attack the sufficiency of this written demand for a statement of rents and profits, for the assigned reason that it was not signed nor executed by authority of the “trustees” of Pacific Crude Oil Company; nor was it attested by the signatures of such “trustees” (Record, p. 78).

Defendants’ argument in the trial court, in support of this contention, was that that company having forfeited its charter on January 28, 1918, to the state of Delaware (where it was incorporated), the company thereafter had no legal existence; that upon such forfeiture, the directors of the company became its “trustees”; and that it was only such “trustees” who could make or authorize the making of the written demand now under consideration.

Assuredly, the effect of this charter's forfeiture, as well as all other questions incident thereto, must be passed upon and determined under the laws of the state under which Pacific Crude Oil Company not only was incorporated, but also had its charter repealed, to-wit, the state of Delaware.

Such matters are provided for and regulated in Delaware, by what are there termed "*The General Corporation Laws*," and "*The Annual Franchise Tax Law*," of that state. Both of these laws are in evidence in this suit, as "*Plaintiff's Exhibit No. 14*." The pertinent sections of these laws have been selected and stipulated upon by counsel for the respective parties; and it is only such stipulated sections that appear in the record on this appeal. (See stipulation, Record, p. 632.)

Pursuant to section 74 of this Franchise Tax Law, this company's charter became void on January 28, 1918, for non-payment of certain taxes then due the state of Delaware. And presumably—although there is no evidence thereof—the governor of that state issued his proclamation accordingly.

That section provides that, if any corporation shall fail to pay certain specified taxes,

"The charter of such corporation shall be void, and all powers conferred by law upon such corporation are declared inoperative and void."

There is no question but that, under this declaration of the statutes, by itself, the Pacific Crude Oil Company would have become civilly dead, and would

have been shorn of all its charter powers on January 28, 1918.

A saving provision for a qualified continuance of such dissolved corporation's existence is, however, provided for by the General Corporation Laws of Delaware, as follows:

Sec. 40. CONTINUATION OF CORPORATION AFTER DISSOLUTION, FOR PURPOSES OF SUIT, ETC.: All corporations, whether they expire by their own limitation, or are otherwise dissolved, *shall nevertheless be continued for the term of three years from such expiration or dissolution bodies corporate* for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, and to divide their capital stock, but not for the purpose of continuing the business for which said corporation shall have been established."

In spite of this clearly specific provision that *dissolved corporations are continued* for three years after dissolution, as "*bodies corporate*," for certain specified purposes, and with certain specified powers, defendants argued in the court below that Pacific Crude Oil Company became absolutely defunct, by the governor's proclamation, on January 28, 1918; and that its then directors became trustees for all and every of the very purposes specified in the statute just quoted.

In an attempt to support their argument, defendants cited sections 41 and 46 of the General Corporation Laws of Delaware.

By this section 41, directors of certain dissolved corporations do become the trustees thereof. But the scope of this section is specifically limited by its terms, to the *dissolution* of any corporation *under the provisions of section 39* of the same laws, which section provides solely for the *voluntary dissolution* of a corporation, by its stockholders, through its directors. It certainly cannot be seriously claimed that either of these provisions are applicable to the dissolution of Pacific Crude Oil Company.

Section 46 will be discussed in connection with other features of the law in this case; and will likewise be shown to have no bearing on the point under consideration.

It seems appropriate to a better understanding, and the consequently better interpretation of these corporation laws, to recall that under the Common Law, when a corporation was dissolved, its real property reverted to the original grantors, its personal property was confiscated by the crown, or the state, and that all its debts, owed either to, or by it, were cancelled. And all this on the theory that, by its dissolution, the corporation was dead like a human person without any legal successors. Courts of equity, with their broad and diversified powers, did much to relieve against this abuse and confiscation of the Common Law. And later their procedure and practice gradually became a part of the legislative enactments of different states, until today there are but few states which have not fully nullified this Common Law, by

legislation looking to the due preservation and distribution of dissolved corporations' assets, for the benefit of stockholders and creditors. Naturally these state laws are far from uniform as to the details of execution, although generally for the same ends and results. And, consequently, the law of the particular state applicable to any case, alone must be considered and applied.

It also must be conceded that these remedial statutes—such as those now under discussion in the case at bar—must be strictly construed; that the provisions thereof must be strictly followed and applied; that the powers and authority given or created thereby are to be exercised only in the form and manner particularly specified; and that only such powers and authority as are thus particularly given or created, are legal, or can be exercised.

Applying these general rules of construction and application to the Corporations Laws of the state of Delaware, as cited and quoted, *supra*, it must be clearly apparent that by the above cited section 40, Pacific Crude Oil Company *was continued as a "body corporate,"* with all the attendant powers and authority of itself, its officers, and directors (*excepting for the purpose of continuing its business*) "for the term of three years" from January 28, 1918; and that its directors did not become trustees to settle its affairs.

In several of the states, directors do become trustees in such cases, and for such purposes. But it is only where and when there is a specific statute to that effect,

and which alone makes them such. A provision to that effect is found in the laws of California. See California Code of Civil Procedure, Sec. 400, as amended by Chap. 216, Stats. 1917 (p. 380). Likewise in the statutes of New Jersey, New Jersey Statutes of 1896, section 54.

There is, however, no such general provision in the Delaware laws. Consequently, in that state, the directors of a dissolved corporation, excepting in cases of voluntary dissolution, do not become trustees to wind up its affairs. And that is in perfect accord with the proviso of section 40, *supra*, which continues the corporation a "body corporate," after dissolution, for that purpose.

The Annual Franchise Tax Law, and the General Corporation Laws of the state of Delaware are each part of a legislative scheme respecting corporations; and, being in *pari materia*, should be construed together. And if the pertinent provisions of these two statutes are considered in their entirety, and in their proper relation to each other, this general scheme is very plain.

By these General Corporation Laws it is apparent that the affairs of a dissolved corporation may be wound up and settled by three different persons, or sets of persons, each depending upon the particular circumstances and conditions of the dissolution.

1. If the corporation is voluntarily dissolved under the provisions of section 39, then *by the directors, as trustees*, as provided for by section 41.

2. If the corporation is dissolved in any other way than by voluntary proceedings under section 39, than *by the corporation itself*, acting through its regular officers and directors, as provided for by section 40.

That a corporation dissolved by the governor's proclamation, for non-payment of taxes, is within the purview of section 40 of the General Corporation Laws, was held in:

Harned v. Beacon Hill Real Estate Co. (Court of Chancery of Delaware), 7 Del. Chan. 232, 80 Atl. Rep. 805.

Affirmed by Supreme Court of Delaware:

9 Del. Chan. 411, 84 Atl. Rep. 229, 233.

3. If either of these trustees in the one instance, or the company itself in the other, has not completely settled the corporate affairs within the three-year term specified in and allowed by section 40 therefor, then by a *receiver*, as provided for by section 43.

This subdivision and classification also tends to explain the section 46 of the General Corporation Laws, which provides that when the dissolution of any corporation is suggested upon the record of any action pending against it, at the time thereof, "the names of the trustees or receivers" shall be entered upon the record, and the action shall proceed against them. It must, therefore, be clear that if the company itself was defending the action, during the three-year extension term, no substitution would be necessary, and, consequently, is not provided for. After the expira-

tion of these three years, the receiver would, of course, be substituted in its place.

That the dissolved corporation, its officers and agents, may lawfully continue, even after the governor's proclamation of the forfeiture of its charter, the exercise of their former rights, powers and authority—subject only to the limitation prescribed by the above cited section 40 of the General Corporation Laws—is also clearly evidenced by the provisions of section 81 of the Delaware Annual Franchise Tax Law.

This section after particularly specifying how a charter that has thus become void, may be reinstated and restored, provides that:

“In all cases in which the charter of any corporation * * * has become inoperative or void by proclamation of the governor * * * for non-payment of taxes, and such corporation has been reinstated and entitled to all its franchises and privileges, *such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its charter by such corporation, its officers and agents, during the time when such charter was inoperative or void, with the same force and effect and to all intents and purposes as if said charter had at all times remained in full force and effect; and all real and personal property, rights and credits which were of said corporation at the time its charter became inoperative or void, and which were not disposed of prior to the time of such reinstatement, shall be vested in such corporation, after such reinstatement, as fully and amply as they*

were held by said corporation at and before the time its charter became inoperative or void; and *said corporation after such reinstatement shall be as exclusively liable for all contracts, acts, matters and things made, done, or performed in its name and on its behalf by its officers and agents prior to such reinstatement, as if its charter had at all times remained in full force and effect.*"

Can there be any doubt but that this section was intended to cover the acts of the dissolved "corporation, its officers and agents" during the three year extension of its corporate existence?

This construction of the Delaware laws is also fully recognized in *Harned v. Beacon Hill Real Estate Company*, cited *supra*, where the Court of Chancery held that

"By section 40 the corporate existence is extended for three years from the time of voluntary dissolution for winding up the affairs of the company. After three years the officers of the company have no power to continue further their winding up duties."

And in discussing the power of the Court of Chancery, under section 43 of the General Corporation Laws, to appoint a receiver for a dissolved corporation, after the expiration of this three years, "to take charge of the unfinished business and undisposed assets of the company," this same opinion says:

"The statute does not indicate the form of the application, but presumably it is intended that the

forms and procedure in equity cases shall be used so far as practicable * * *. In every suit there must be parties, and *the corporation, though paralyzed, is still a proper party, and its officers may answer for it in that suit.*"

The Delaware Supreme Court, on the appeal of this case, says:

"But one question raised is 'whether the company could be made party defendant in the proceedings instituted below for the appointment of a receiver'."

And after quoting this section 40, in full, continues:

"We fail to see that section 46 of the Corporation Act is at all pertinent to the question before us, because its sole purpose is to provide that a suit begun against a corporation before dissolution, shall not abate on account of the dissolution," etc.

"That section (40) provides for the continuance of the corporation for three years after dissolution in order *that the company itself* may settle and close its business. Such settlement would be entirely voluntary with the company. * * * The procedure that is not only usually, but invariably, followed in such court is the one that was adopted in the present case. A bill of complaint was filed, and necessarily there had to be a defendant in the action. *Who should be named as defendant? Manifestly there could be none other than the Beacon Hill Real Estate Company, the dissolved corporation. If such corporation could not be made party defendant, then there could be no defendant named.* * * * In that way only would the company be

apprised of the fact that application had been made to the court for the appointment of a receiver to sell its property."

Do not all these expressions of the law clearly show the company's continued actual existence under section 40? And that the directors do not become trustees? In that case, the company, as such, was sued, and answered through its proper and usual officers.

Analogous provisions of the statutes of states other than Delaware, have also been similarly construed.

Harris-Woodbury Lumber Co. v. Coffin (C. C., W. D. Nor. Carolina), 179 Fed. 257, 263, construing the statutes of New Jersey.

Hanan v. Sage (C. C. Minn.), 58 Fed. 651.

Olmstead v. Distilling & Cattle Feeding Co. (C. C. Illinois), 73 Fed. 44;

Boyd v. Hankinson (C. C. A. 4th Circuit), 92 Fed. 49, construing the statutes of New Jersey.

In Hanan v. Sage the court says:

"The Corporation, under this statute, did not cease to exist after the decree of the Supreme Court (forfeiting charter), but continued its organization and retained its officers and directors, and its stockholders continued to be such, with all the authority possessed before. True, the corporation only existed for the purpose of winding up its corporate business, and closing up its concerns; but to do this it had full control over all its property, and could dispose of it for the purposes indi-

cated in the statute. * * * The statute is clear in its terms, and, unless the act done by the corporation before the three years expired is clearly for some purpose other than that pointed out, or is fraudulent, there is no reason why the conveyance to the defendant should be declared void."

And like construction was made in the *Olmstead* case:

*"I do not think, as was argued here, that the directors of said corporation became trustees. It seems to me that, within the sense of the statute, the corporation itself became a trustee as soon as the judgment of ouster was rendered. * * * Here, by our statute, the corporation itself, when the judgment of ouster was rendered, became the trustee, for the purpose of converting and dividing its property among the persons who were entitled to receive the same."*

C.

Pacific Crude Oil Company's Retaining of Cochran as Its Attorney, Was Not Within the Statute of Frauds. Nor Was the Written Demand on Defendant-Appellant for a Statement of Rents and Profits, at All Affected by that Statute.

Appellant's brief presents but one point of argument (point 3) against the sufficiency of this written demand on defendant-appellant, for a statement of rents and profits.

The substance of that argument is that Coochran's retainer as attorney, by Pacific Crude Oil Company,

is within the statute of frauds; and not being in writing, is void. And further that, consequently, Cochran's acts as such attorney, under such retainer, were unauthorized. It also being more particularly contended that "the agreement of employment of William H. Cochran by the Pacific Crude Oil Company covered the period of five years, and not being in writing as required by section 1624 C. C., was utterly void. William H. Cochran therefore had no right to make the demand in writing as attorney of the judgment debtor."

Appellant's argument shows that appellant either has failed to appreciate the objects and purposes of this statute, or that it has deliberately ignored the same. For, as was said in

Colon v. Tosetti, 14 Cal. App. 693, 113 Pac. 365,
366,

"The statute of frauds is for the prevention, not in aid of the perpetration, of fraud. It is to be used as a shield, not as a sword."

Appellant argues that because Cochran, under this retainer, was occupied for several years in his work as attorney for the judgment debtor, Pacific Crude Oil Company, *this fact* brings his contract of employment within the statute of frauds.

Appellant again fails to appreciate the very terms of the statute on which it relies, and which it quotes in its brief; and appellant likewise incorrectly reads its own cited authorities.

Section 1624 of the California Civil Code—which is cited and relied on by appellant—clearly and in express

words covers *only* an agreement that “*by its terms*” is not to be performed within a year.

The only evidence as to Mr. Cochran’s retainer as attorney for Pacific Crude Oil Company, is in his own testimony on that subject, appellant is again in error in its quotation of Mr. Cochran’s testimony on that subject, so far as such testimony is pertinent to this demand for a statement of rents and profits.

The testimony as quoted by appellant is strictly limited to Mr. Cochran’s first coming to California in February, 1914. He returned home in July, 1914. And after the commencement of the suit in which the judgment here involved was entered, and in January, 1915, he was again retained as attorney by Pacific Crude Oil Company, to protect its interest. Mr. Cochran’s testimony as to this particular retainer, appears on page 96 of the record, as follows:

“I was asked if I would return to California and fight this matter through; and while I opposed first, they (the stockholders of Pacific Crude Oil Company) said they wanted me to come back, and that I should return here (California) and do whatever I thought was best not only in legal proceedings but otherwise so that the property would not be lost to them.”

Is there anything in any part of Cochran’s testimony to indicate, or upon which any fair assumption can be legally founded, that either of the parties to this retainer *then* thought or contemplated that the legal services which Cochran was *then* retained to perform and carry out, would cover the period of time which subse-

quent developments—and more particularly the actions of this defendant-appellant—required should be given to them? Certainly the “*terms*” of this retainer do not indicate or show any such thought or contemplation; or that, in fact, such legal services could not and would not “be performed within a year from the making” of such retainer; or that Cochran was then retained for any specific term which assuredly was for longer than a year.

It is doubtful if defendants’ solicitors in this suit have any written retainer from their clients. This suit has now been pending for considerably more than a year. Will those solicitors admit to their clients, that their retainer is within the statute of frauds, and that, consequently, they have no right of recovery for their legal services herein?

The question is not as to the length or period of time actually occupied in the performance of the agreement. The real and the only question is “*do the ‘terms’ of the agreement by themselves show that the agreement was not to be performed within a year?*”

The decisions of the California courts on the cited provisions of the California Civil Code brook no discussion on that question. See:

Stewart v. Smith, 6 Cal. App, 152, 91 Pac. 667, 670;

Hellings v. Wright, 29 Cal. App. 649, 156 Pa. 365;

McKeany v. Black, 117 Cal. 592, 49 Pac. 710;
Dougherty v. Rosenberg, 62 Cal. 37.

In *Stewart v. Smith*, the California Court of Appeals says:

“It is sufficient to say that the contract in question is not ‘an agreement that by *its terms* is not to be performed within a year from the making thereof.’ It is said in *McKeany v. Black*, 117 Cal. 592, 49 Pac. 710, ‘if the contract by *its terms* is not to be performed within a year it is void, but *if it may by its terms be performed within a year, it is not, even though it may not be performed within that time.*’ To the same effect are *Dougherty v. Rosenberg*, 62 Cal. 37, and *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 721.”

The only quoted citation in appellant’s brief—from Chitty on Contracts—is in no way in conflict with the doctrine laid down in these decisions. On the contrary, it is in perfect accord with them; and absolutely fails to support appellant’s argument and contention.

Moreover, the parol agreement having been entirely executed, is not within the statute of frauds.

Simmons v. Sweeney, 13 Cal. App. 283, 109 Pac. 265;

McCarthy v. Pope, 52 Cal. 561.

Defendant-appellant also waived any possible defense of the statute of frauds, by failing to object on such ground, to the parol evidence relative to the retainer in question, when such evidence was offered and given.

Nunez v. Morgan, 77 Cal. 427, 433, 19 Pac. 753, 755.

And again, no mere “intruder”—as is this defendant-appellant—“can invoke the aid of the statute of frauds.”

Stewart v. Smith, 91 Pac. 667, 670.

Assuredly this Honorable Court will not permit appellant to turn into a “sword” what was intended to be used as a “shield” against fraud.

FIFTH POINT.

The Assignment by the Judgment Debtor, Pacific Crude Oil Company, to Complainant, of the Right of Redemption Here Involved, Was Made With Due Authority: Was Sufficient to Transfer to Complainant Such Right of Redemption: and Complainant Thereby Became Entitled to Make the Same.

By a certain instrument in writing, dated June 11, 1919, the judgment debtor, Pacific Crude Oil Company, assigned to complainant, for an expressed valuable consideration, the redemption and the right of redemption involved in this suit. (Plaintiff’s exhibit No. 8, record p. 569.)

Appellant questions and attacks this assignment upon three separate and different grounds; First: That it was not legally executed and the Pacific Crude Oil Company was not bound thereby. (Appellant’s brief, point 6.); Second: That it is invalid by reason of the fiduciary relationship existing between the parties thereto (Appellant’s brief, point 5.); And third: That it

does not entitle complainant to make this redemption unless he has an interest in the whole or some part of the property. (Appellant's brief, point 4.)

I.

This Assignment Was Prima Facie Evidence; the Burden of Disproving It, and of Showing Any Invalidity, Was on Defendants; and the Assignment Was Properly Admitted in Evidence.

Appellants' whole argument under point 6 of its brief, is devoted to an elaborate discussion of the powers and authorities of officers of a corporation in general; and more particularly as to the powers and authority of the officers of this judgment debtor under the statutes of the state of Delaware.

But in the intensity of its argument on the question of the general powers and authority of corporate officers, *appellant*, unfortunately, *has overlooked or lost sight of the fact that such question is not at all here involved.*

The sole question here is, "was this assignment properly admitted in evidence?" And on that question, the powers of the judgment debtor's officers to execute the assignment, is of no possible material interest or concern.

The question of the propriety of the Honorable District Judge's admission of this original assignment as evidence in this suit, is controlled by the statutes of California relative to such evidence.

Section 1951 of the California Code of Civil Procedure provides, in part, as follows:

“Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof.”

The provisions of the Civil Code to which reference is thus made, are found in S. 1189 thereof. The pertinent part thereof is as follows:

“Provided, however, that any acknowledgment taken without this state in accordance with the laws of the place where the acknowledgment is made, shall be sufficient in this state; and provided further, that the certificate of the clerk of a court of record of the county or district where such acknowledgment is taken, that the officer certifying to the same is authorized by law so to do, and that the signature of the said officer to such certificate is his true and genuine signature, and that such acknowledgment is taken in accordance with the laws of the place where the same is made, shall be prima facie evidence of the facts stated in the certificate of said clerk.”

The certificate which is a part of this assignment, not only accurately follows, but also completely complies with these several requirements of the Civil Code. (Record, p. 574.)

Consequently, this assignment, together with the accompanying certificate as to the acknowledgment there-

of, were properly received in evidence by the honorable trial court, under the just quoted provisions of S. 1951 of the California Code of Civil Procedure.

It may properly here be noticed that while at first the learned District Judge admitted in evidence only the assignment (Record, pp. 98, 99), later the "whole paper," including the certificate of acknowledgment, was admitted in evidence on the court's own declaration to that effect; and that that was done without any objection or exception by defendants. (Record, p. 125.)

II.

The Delaware Statutes Do Not Affect this Rule of Evidence.

Appellant presents some argument—which on its very face shows appellants' own lack of faith and confidence therein—as to the powers and authority of Pacific Crude Oil Company's officers to execute this assignment, in view of the forfeiture of that company's charter. And certain provisions of the Delaware statutes are cited in an effort to bolster up this very weak and shaky argument.

It has been already shown, *supra*, that there is no question of the powers of the judgment debtor's officers properly before this Honorable Court for review. The sole question now under consideration, is purely and solely one of evidence. And on that question the cited Delaware statutes have no bearing.

However, these Delaware statutes have been already fully presented and discussed by appellees (fourth point

B). And it has been unquestionably shown and established that, in spite of the forfeiture of its charter, Pacific Crude Oil Company's corporate existence was continued for all the purposes and matters involved in this suit; and that the company likewise retained its officers and directors with all the respective attendant powers and authority as before the forfeiture was had.

III.

No Question as to the Validity of this Assignment Is at Issue in this Suit, Nor Can Its Validity Be Questioned Herein.

Appellant asserts that this assignment *is invalid* by reason of the fiduciary relations between the parties thereto. (Appellant's brief, point 5.)

If such were the law, it certainly would be a new and most startling doctrine. No wonder appellant's brief is so silently silent on authorities to support the assertion. If such were the law, no trustee could ever deal with the *cestui que trust*, as to the trust estate. Nor vice versa.

All the authorities cited by appellant, go simply to the proof of good faith and the sufficiency of the consideration, *if and when the transaction and the consideration therefor is questioned by the beneficiary himself.*

It certainly is a most startling, preposterous, and absurd claim that a third party, a mere intruder, can collaterally question the validity of transactions between a trustee and a *cestue que trust*; or collaterally inquire

into the sufficiency of the consideration for such transactions. Or that on the mere unfounded insinuations of such an intruder, a party would be bound to prove the validity of his transaction and the sufficiency of its consideration.

There is one statement in appellant's brief that is not only unqualifiedly false and unfounded, but which also ill becomes appellant's brief on this appeal. And that is the statement that "the undisputed evidence discloses that the consideration for the assignment was not only inadequate but tended to operate as fraud upon the stockholders of the Pacific Crude Oil Company." While, as already said, no such question can be properly raised on this appeal, this statement should not be left unanswered, or appellees might be considered as admitting its truthfulness.

There is not a suggestion, let alone any evidence, of the value of the property in controversy.

The evidence clearly shows what complainant gave or paid for this right to redeem. (Record, p. 90.) And that Pacific Crude Oil Company, who assigned the redemption right, was then without any money, so that it could itself make this redemption, or even pay complainant for his years of legal services. (Record, p. 97.) And Cochran gave a general release to the company and all its stockholders.

Nor is there any warrant from the evidence, for any conclusion that this assignment was not authorized by the largest amount of the outstanding company's stock, as, in fact, it actually was.

This ill-founded and untrue statement should have found no place in a brief before this Honorable Court. It is the more marked as coming on behalf of one who not only has endeavored to unlawfully seize and retain this property for itself without any consideration, but who has also ignored and violated every rule and principle of justice, fairness, law and equity, as repeatedly found by the honorable trial judge, and also by the special master herein.

This Honorable Court's indulgence and pardon is asked for this transgression.

IV.

THE RIGHT AND POWER TO ENFORCE THE REDEMPTION ASSIGNED TO COMPLAINANT, IS NOT DEPENDENT UPON CLAIMANT'S ALSO HAVING AN INTEREST IN THE WHOLE OR ANY PART OF THE PROPERTY. BUT, IN ANY EVENT, COMPLAINANT HAS SUCH AN INTEREST.

Appellant argues (Appellant's Brief, Point 4) that as the California Statute (Code of Civil Procedure, Sec. 701) provides for redemption by "The judgment debtor, or his successor in interest, in the whole or any part of the property," the debtor cannot, "Independent of a transfer of some interest in the property, clothe a stranger as assignee with the right of redemption which is given only to him personally or to his successor in interest in the whole or part of the property."

Appellees respectfully submit that the right of redemption is a purely personal right, which follows the person and not the land. And that, consequently, ownership of neither the property nor even of any interest therein, is essential to the exercise and enforcement of such right. And further that such right is assignable, and is enforceable by the assignee thereof, regardless of any ownership of the property.

Appellees further respectfully submit that, in any event, complainant has such an interest in the property.

Before proceeding with the argument on these contentions, appellees would direct attention to the assignment of this right of redemption. (Plaintiff's Exhibit No. 8, Record, p. 569.) This instrument, in the necessary and proper language, transfers to complainant,

"All and every right, title, interest, benefit and advantage under and because of the said right of redemption; and also every power and authority in connection therewith, including any and all rights of action and proceedings to make and enforce such redemption. It being the intent and purpose of the said Pacific Crude Oil Company, by this instrument, to absolutely and fully assign and transfer unto the said William H. Cochran, not alone its aforementioned certain right of redemption, but also every right, power and authority, either at law, or in equity, in any way connected therewith so that the said William H. Cochran may as fully and completely make and enforce such redemption as this company might, and could do, if this sale and assignment had not been made, and as if this company was personally present."

A.

The Judgment Debtor's Right to Redeem Is Not Dependent Upon Any Ownership of the Property. Such Right Is Assignable; and May Be Enforced by the Assignee Thereof, Regardless of Any Interest in the Property.

The statute unqualifiedly gives the "judgment debtor" the right to redeem. Such right is given without any qualification or limitation whatsoever.

That the judgment debtor may make redemption even if he has transferred his interests in the property to be redeemed, *or even if he never had any interest therein*, has been repeatedly held by the courts.

The generally well recognized rule on this question is stated in 17 Cyc. at page 1327, as follows:

"The statutes giving the judgment debtor the right to redemption do not make the actual ownership at the time of sale or redemption a condition precedent, the right following the person and not the land, and continuing for the period prescribed by the statute, although the debtor meanwhile may have parted with his title."

And numerous cases are cited as authorities for this text. For the California authorities there cited, see:

So. Calif. Lumber Co. v. McDowell, 105 Cal. 99, 38 Pac. 627;

Yoakum v. Bower, 51 Cal. 539.

The case of *So. Calif. Lumber Co. v. McDowell* is of particular interest in that the judgment debtor never had had any title to or even any interest in a certain part of the property sold at the execution sale; and yet he was held to be entitled to make its redemption.

Yoakum v. Bower holds that even if the judgment debtor has parted with his interests in the property sold under execution, he still retains his right of redemption thereof, a like right being also given to the purchaser or successor to such interests. In its opinion in that case, the Supreme Court of California says:

"A defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution. The Code of Civil Procedure, section 701, provides in terms that property sold subject to redemption may be redeemed by the judgment debtor or his successor in interest in the whole, or any part of the property. The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem; not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution. There is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily

be imagined, in which the judgment debtor, even though he had sold the property, would still have an interest in effecting a redemption from the execution sale."

Moreover, if it were requisite that with an assignment of the right of redemption, there should also be a conveyance of some interest in the property itself, then the right would not be personal, but would necessarily be running with the land. And that is not the character of the right of redemption, as has been already shown.

It thus is clearly apparent that—in so far at least as the judgment debtor is concerned—the right of redemption is a right given to the judgment debtor, as such; and that as it does not "run with the land," the successor in interest in the property would not have any right of redemption thereof, except for this specific provision of the statute that gives him an equal right of redemption with the judgment debtor.

It being established that the judgment debtor has a personal right of redemption independent of the ownership of the property to be redeemed, the questions arise: Can this mere right of redemption be assigned by the judgment debtor? And can it be enforced by the assignee thereof?

The general rule as to the assignability of such right, is stated in 17 Cyc. at page 1329, to be as follows:

"The general rule is that the statutory right to redeem property sold at an execution sale is

assignable, and the assignee succeeds to all the right and interest of his assignor."

It becomes pertinent to consider at least the legal, if not also the equitable nature and character of the right of redemption as thus given by the statute. The legal nature and character is specifically defined and prescribed by the California Civil Code.

Section 655 of that Code provides, in part, that,

*"There may be ownership of * * * rights created or granted by statute."*

As this statutory right of redemption is surely within this provision, the judgment debtor likewise assuredly has "*ownership*" of such right.

The code further provides by section 654, as follows:

"In this code, the thing of which there may be ownership is called property."

Under these two cited provisions of the code, the judgment debtor not only assuredly has "*ownership*" of this right of redemption, but such right is also "*property*."

Absolute ownership of property is also defined by section 679 of the Civil Code in the following language:

"The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws."

The statute which gives this right of redemption to the judgment debtor, makes no qualification or limita-

tion of his *absolute ownership* thereof. Nor does it place any limitation on his right to “*dispose of it according to his pleasure.*” Nor is there any such qualification or limitation created by any “General” or other laws.

As the judgment debtor had the absolute ownership of this right of redemption, it also had the right to “dispose of it according to his pleasure.”

Appellant concedes in its argument that the judgment debtor had the right to assign this right of redemption; but contends that such assignment is not capable of enforcement without the assignment of some further and attendant rights in the property itself.

To sustain such a contention would be a mockery. It would be to say that a “right” may be assigned, but not the assignor’s remedy of enforcing the same. It would be to say that while one may dispose of his property “according to his pleasure,” he cannot transfer his rights of enforcement in connection therewith. It would be to say that the assignee must have interests in the property, which are not requisite to the assignor’s right to redeem. It would be a transfer of a mere shell, without any kernel. In other words, such “property” would be valueless and incapable of realization, unless retained by the judgment debtor himself. And the provision of the statute that he may “dispose of it according to his pleasure” is valueless, and but a travesty.

B.

Complainant Had an Interest in the Property.

Appellant further argues that the assignment in question does not entitle complainant to make this redemption, "unless he has an interest in the whole of the property or some part thereof."

The record on this appeal indisputably establishes that the *legal title to the property involved in this suit, was in William H. Cochran, the complainant in this suit*; and that, at the time of the execution sale of March 3, 1917, he was in undisputed possession and occupation of that property by virtue of such legal title.

In this connection, the opinion of the Honorable Trial Judge on the hearing of this suit, is particularly pertinent, when he not only holds that complainant had the "right to redeem," but also that "it was his (Cochran's) duty to redeem." (Record, p. 128.)

The purposes for which Cochran held this legal title, certainly are of no material concern. The important fact is that Cochran held and owned the legal title to this property.

Can it be doubted but that complainant's holding and ownership of the legal title to this property, was sufficient "interest in the property" as to satisfy even this argument of appellant?

SIXTH POINT.

Appellant, as Purchaser at the Execution Sale, Acquired No Right of Possession of the Property Then Sold. Nor Could Said Purchaser Lawfully Take Such Possession until After the Expiration of the Period Within Which Redemption from Said Sale Could Be Made. Consequently, Appellant Was a Trespasser on the Real Property Involved in this Suit.

The elaborate argument in appellant's brief on express and resultant trusts may be interesting, but it is not important nor relevant to the real question involved on this appeal and which appellant has endeavored to camouflage with immaterial law and authorities.

It is not questioned but that, at the execution sale of March 3, 1917, all the then existing interests of Pacific Crude Oil Company in the property involved in this suit were sold to appellant.

But it does not seem important to now exactly define and fix what those interests were. That the judgment debtor then had some such interests is conceded. And even if the finding in the "sixth" paragraph of the interlocutory decree, by which such interests are adjudged, is erroneous—as now claimed by appellant, but to which no error has been assigned—this Honorable Court is not bound to adopt or follow such finding; nor can this final decree be reversed because of any erroneous finding—even if there be one—provided, of course,

that the conclusions of the decree are otherwise well founded.

The important and *the only question* (on this point) which goes to the merits of the decrees in this suit, is, *what are the rights acquired by appellant as purchaser at the execution sale of the then existing rights and interests of Pacific Crude Oil Company in the real property involved in this suit?* It is not a question of what rights or interests of the judgment debtor were sold. *The sole question is as to the rights of the purchaser in connection with whatever was sold.*

Appellant's whole argument is devoted to obscuring the only important and the real question, in the hope of offsetting and upsetting one of the fundamental principles and rules of law and equity on which the master's report and the decrees herein are founded, to-wit, "*that appellant was a willful trespasser on the property involved in this suit.*"

It is conceded by appellant that, at the time of the execution sale, Mr. Cochran was the holder and owner of the legal title to this property; and that he was then also in actual possession, occupation and operation of the property. In fact as well as at law, Cochran as the holder and owner of the legal title, was the only person entitled to such possession. Pacific Crude Oil Company had no right of possession. At the most it had the right to obtain such possession, but only in a lawful and proper manner.

Appellant's sole conclusion and contention on its argument is stated by appellant to be that Cochran is

“charged with the obligation to convey the land to the Pacific Crude Oil Company at the latter’s demand. This obligation was enforceable in equity.”

Speaking generally, this is a fair statement of the law. But appellees would further say that such conveyance would be made only when and after the trustee’s rights and interests in connection with the trust property had been fully provided for. In other words, the claimed right to a conveyance would not necessarily be an absolute right free of any and all conditions.

In this case, Pacific Crude Oil Company never made any demand on Cochran to convey this property, nor did it ever bring any action to compel such conveyance.

A.

The Purchaser at an Execution Sale Acquires Only an Equitable Estate in the Property Sold, With the Right to Receive the Rents Therefrom, or the Value of the Use and Occupation Thereof. And the Judgment Debtor Is Entitled to the Possession Until the Time for Redemption from the Sale Has Expired. Consequently, Big Sespe Oil Company, by Taking Possession of the Property in Suit, Was a Trespasser Thereon.

The only pertinent statutory provision as to the rights of a purchaser at an execution sale, in connection with the property thus sold, is found in section 707 of the California Code of Civil Procedure, which, in part, provides that

“The purchaser, from the time of the sale until a redemption, * * * is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.”

Aside from this statute, the respective rights of the owner and of the purchaser, in connection with the sold property, between the times of the sale and of the expiration of the redemption period, have also been repeatedly and uniformly laid down by the decisions of the Supreme Court of California. See:

Page v. Rogers, 31 Cal. 293;

Walker v. McCusker, 71 Cal. 596;

Purser v. Cady, 120 Cal. 214, 218, 52 Pac. 489.

The substance of these decisions is that:

The purchaser acquires only an *equitable estate in the property sold until the time for redemption has expired*; and that the judgment debtor, or his successor in interest in the property, is entitled to its possession, until the time for redemption has expired, assuming, of course, that he had previously had such possession.

Thus, the purchaser is entitled not to possession of the sold property, but, under the statute, only to receive the agreed “rents” thereof from the “tenant in possession,” if there be one; or “the value of the use and occupation thereof,” should the owner himself remain in possession and use of the property. In such latter case the owner is considered to be, and held liable to the purchaser as a “tenant in possession.”

Harris v. Reynolds, 13 Cal. 515.

Even the case of *Pollard v. Harlow*, 138 Cal. 390, 392, 71 Pac. 454, which is cited in point 2 of appellant's brief as an authority, reiterates and reaffirms this doctrine. The opinion in that case speaks of the rights acquired by the sale, and says that they were "*subject to be defeated by a redemption * * *, and to the right of the judgment debtors to remain in the possession of the land until the execution of the sheriff's deed.*"

In fact, appellant also expressly admits this to be the true doctrine, for after asserting what it claims to have acquired by the sale, its brief says that their rights were subject to the "right of the judgment debtor to the possession of the property during the period allowed for redemption."

In these just cited cases the judgment debtor was the legal owner of the lands which actually were sold, and was in actual possession thereof. And although the lands themselves were sold, the purchaser acquired no right to their possession, such possession remaining as before.

In the case at bar, the judgment debtor was not in possession of the property here involved. Nor did it have any right of possession thereof. At the most, it had simply the right to obtain possession under lawful conditions, and in a lawful and proper manner. Even if appellant's argument be adopted, Pacific Crude Oil Company had but an equitable estate which had not been reduced to possession.

Moreover, by the interlocutory decree, paragraph "eighth," it was decreed that the "Purchaser, Big Sespe Oil Company, was not entitled to such possession or occupation of the said real property." And to this appellant failed to assign any error.

As appellant had no right to possession, its unlawful possession of this property was a trespass thereon.

Appellant's paltry excuses and pleas of justification for its conceded trespass are farcical. The law recognizes no excuses for the commission of an unlawful act.

Appellant says that "possession was taken solely for the purpose of operating and caring for said property." And asks, inasmuch as it was entitled to the rents from the property, "How can it be said that complainant or the judgment debtor was in any wise injured by the possession of appellant?"

The "care" which appellant so considerately gave to this property, and the injury which appellant attempted, are fully set up in its account herein. The opinion of the special master (Record, p. 399), which accompanied his report, is, for the moment, probably a sufficient answer and denunciation of appellant's solicitous interest and inquiry. But more of this subject anon.

SEVENTH POINT.

Big Sespe Oil Company Is Not the Owner of the Property Inventoried in Schedule "E".

A.

Appellant claims to be the owner of all the machinery, equipment, buildings and structures which are on the real property involved in this suit, and also even such as are sunk therein. All these are particularly itemized in schedule "E" of defendant's account before the master. Appellant bases its claim of such ownership on a certain "Certificate of Sale" from the sheriff of Ventura county, state of California. (Defendant's exhibit "B" before master, record, p. 628.)

Because of this alleged ownership, defendant also asserts in its account that it is entitled on this accounting, to a credit equal to 7% per annum on the "estimated value" of all this property as inventoried and appraised in schedule "E," as compensation for the use thereof in connection with the operation of this realty.

Appellees contend that appellant did not acquire any such ownership or title by said sheriff's sale; and that consequently this claimed credit for interest should not be allowed.

On February 17, 1917, the sheriff of Ventura county, California, acting under the same writ of execution and the same judgment as are involved in the execution sale of the realty herein, undertook to sell the "*personal property*" of the judgment debtor, *Pacific Crude Oil*

Company. According even to the very terms and provisions of this "Certificate of Sale," which was given to Big Sespe Oil Company after such sale, the said sheriff then sold *only* "*all the right, title and interest*" of the said *Pacific Crude Oil Company*, of, in and to the property in the said certificate particularly mentioned, which property was then and there on and in this reality, and which is also practically the same as appellant now claims to own.

By the two deeds of March 30, 1914, which are in evidence (plaintiff's exhibits 5 and 6, Record, pp. 557-568) there was sold and conveyed unto "William H. Cochran as trustee for Pacific Crude Oil Company," not only the real property involved in this suit, but also all the personal property and effects then and there thereon. Such personal property is more particularly described in the "Schedule of Personal Property" which is made a part of each of said deeds. And it has been established in these proceedings that all the personal property as was thus sold and conveyed includes what is here claimed by appellant.

As appellant has always conceded, and as it also has been decreed that, by virtue of these two deeds, Mr. Cochran acquired the legal title to the realty, can it be seriously questioned that he did not also likewise acquire the legal ownership of the personal property on that realty?

Consequently, all that was and in fact all that could have been sold at the sale in question was the Pacific Crude Oil Company's right to enforce the trust in con-

nection therewith, against the trustee. And, at the most, the purchaser at that sale acquired no greater right or interest than this, in that personal property.

The personal property was not sold. Therefore, Big Sespe Oil Company did not purchase it. Nor is that company the owner of that property.

There is, therefore, no legal foundation for the claimed credit of interest on the estimated value of such property; and that, in no event, would that item of the account be allowable.

Appellees also further submit that, in any event, and under the particular circumstances of this case, appellant would not be entitled to compensation for the use of this property, on the basis of its "estimated value," but solely on the basis of *defendant's actual investment therein, that is to say, on the \$300 which defendant paid at the execution sale of February 17, 1917.*

Appellant claims to have bought all this property for \$300; and yet also claims that, when bought, it was worth some \$18,000. And then asks compensation for its use, on the basis of the latter valuation. Would an allowance on such a basis be equitable? "*He who comes into equity must do so with clean hands.*"

Does not this vast difference in these figures also conclusively show that *appellant did not buy this property, but that it bought only the right of the judgment debtor to enforce the trust in connection therewith?* Is it possible even at a fairly and properly advertised and conducted sheriff's sale, *to buy for only \$300 what is said to be worth \$18,000. Mirabile dictu.*

Moreover, if appellant acquired this property on February 17, 1917, as it asserts it did, did it take the property away from the realty, that is "down the hill and back again"? It did not, but left it just where and as it was. And yet appellant also asserts that the cost of merely bringing such property up on to the realty would be a considerable one; and that such an item of expense is included in its "estimated valuation" of such property. As appellant did not have the expense of bringing this property "up the hill," and even saved the cost of taking it "down the hill," why should that item be considered in estimating the value of the property?

The only testimony on the valuation of this property was given by Hornada. Aside altogether from the interest and natural bias of this lone witness, complainant submits that Hornada was not legally qualified as an expert on such values. Hornada never bought nor sold used property of this character; nor did he know the cost price of similar new property either in March, 1917, or at the present time, although conceding that that was an essential element in determining the values which he attempted to put on this property.

Competent experts could easily have been obtained by appellant to prove these values, even were such question material on this accounting.

Hornada's testimony as to values should be disregarded as he was not legally qualified as an expert. The only legal proof of value, even if material, is what appellant paid for the property, viz., \$300.

B.

Appellees further submit that, in any event, much of what is included in schedule "E" of the account is *not* "*personal property*"; and that, therefore, it legally was not the subject of sale under execution of property of that description and character. And the sale of February 17, 1917, was purely a sale of "*personal property*."

The California Civil Code provides as follows:

"S. 658. *Real Property.* Real or immovable property consists of:

1. Land;
2. *That which is affixed to land*;
3. That which is incidental or appurtenant to land;
4. *That which is immovable by law.*"

That code also further defines what is deemed under this section to be "*affixed to land*," in the following language:

"S. 660. *Fixtures.* A thing is deemed to be *affixed to land* when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; are permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws."

Most of the items of schedule "E" of the account, surely come within this definition of a "*fixture*," or

what is deemed under the statute just cited to be "*affixed to land.*"

The three different derricks are "imbedded in the land" or certainly "permanently attached" to what is thus imbedded.

The two *camp houses* and the pump house are at least partially "imbedded in the land," or, in any event, are "*permanently resting upon the land,*" within the intent and purpose of the statute.

Likewise the five tanks, which are connected up by various pipes, are "permanently resting upon the land."

The item of "*four wells*" with their casing, is the most aggravated instance of the absurdity of defendant's claim that all the items of schedule "E" are "personal property." Hornada testified that the "well" is simply "the hole in the ground." Certainly, therefore, the "well" is not movable. Whether or not the casing was "permanently attached" to this "hole in the ground," within the intent and purpose of the statute, is best answered by Hornada's testimony as to why defendant had not pulled the casing at wells 1 and 2. He testified that if he had pulled this casing the wells would have caved in; that if he had pulled the casing, naturally the wells would cave in; that to attempt to put it back would be a difficult job; it would mean redrilling the wells, to put them in working condition. *Can it be seriously claimed that a thing which can not be removed without destroying or seriously injuring the property is "personal property" and not a "fixture"?* Yet defendant claims these "holes in the ground" and the cas-

ing therein to be “personal property,” and that it owns the same. And it “estimates” the value thereof at \$8,000, or almost *one-half of the total estimated value of all the items of property inventoried in schedule “E.”*

And further, it is the fact that all the other items of this schedule “E,” excepting the “lot of small tools,” possibly some loose piping and tubing, and household furniture are “permanently attached” in some way or other to some of the buildings, derricks, or other fixtures on the property. For example, the engines, calf wheels, cables, crown pulleys, boiler, pumping plant and blacksmith shop. Can it be possible that they are not legally attached to the property, so as to be “fixtures” thereon, within the intent and meaning of the statute.

It seems unnecessary to discuss the several items of schedule “E” separately, or the cases particularly applicable to “fixtures” of like character, as the well recognized and well established rule generally applicable to the determination of what are and what are not “fixtures” fully covers all these items. This rule was early stated by the California Supreme Court, and uniformly since then followed. See:

Fratt v. Whittier, 58 Cal. 124, 131,
where it was *held* that,

“The true rule deduced from all the authorities, says the Supreme Court of Virginia, seems to be this, that when the machinery is permanent in its character and essential to the purpose for which the building is occupied, it must be regarded as realty, and passes with the building; and that what-

ever is essential for the purposes for which the building is used, will be considered as a fixture, although the connection between them may be such that it may be severed without physical or lasting injury to either. (Green v. Phillips, 26 Gratt. 752; Shelton v. Ficklin, 32 *Id.* 735.)”

This principle of law, that the fact of the thing being essential for the purpose of the land, is at least one of the main factors in the determination of whether it is a “fixture,” or whether it is “affixed to the land” within the intent of the statute, was even earlier recognized by the courts. See:

Merritt v. Judd, 14 Cal. 60;

McKiernan v. Hesse, 51 Cal. 594.

In Merritt v. Judd the California Supreme Court *held* as follows:

“A steam engine and boiler, fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and *used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture.*”

That case also cited several authorities to like effect as to other fixtures. For example:

A cotton gin attached to the gears in a gin house upon a cotton plantation;

A steam engine, with its fixtures, used to drive a bark mill and pounders;

Mill chain, clogs and bars, being in their appropriate place.

In *Goss v. Helbring*, 77 Cal. 190, 191, 19 Pac. 277, it was *held*

“A pump placed in the basement of a building and *planted down on the ground*, and *connected to pipes belonging to water works*, so as to admit steam and water, *is sufficiently affixed to the water works to bring it within the California lien law.*”

What item of schedule “E” can possibly be claimed to be not a “fixture,” or not “affixed to the land,” within the purpose and intent of this statute as thus interpreted by the court? Complainant submits that, aside from some tools, or miscellaneous and loose equipment, every item of property mentioned in that schedule is either “*imbedded in the land*,” or “*permanently resting upon the land*,” or is “*permanently attached to what is thus permanent.*” And, consequently, that all these items of property are “fixtures” and not “personal property”; and that they were not subject to sale as personalty.

While this is the law applicable to “fixtures” in general, there is also a statute specifically applicable to “fixtures” on mining properties, which unquestionably is controlling in the suit at bar, as it concededly involves only mining lands.

This is found also in the California Code of Civil Procedure, which provides as follows:

“S. 661. *Fixtures Attached to Mines.* Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or

tools used in working or developing a mine, are to be deemed affixed to the mine."

The property involved in this suit is concededly mining property, producing crude petroleum.

The question whether the items of property mentioned in schedule "E" of the account are "fixtures" and, therefore, "real property," or are "personal property," must be determined by the provisions of this section of the California Civil Code, and section 660 on the subject of "fixtures" in general.

By this section 661 the general statute is extended as to mining properties so as to include "machinery and tools."

The extent to which the provisions of this section have been applied is shown in

Malone v. Big Flat Gravel Co., 76 Cal. 578, 18
Pac. 772,

where the California Supreme Court sustained a lien for work in the blacksmith shop on the property, in sharpening picks and drills, making pipe, and other like necessary work, on the ground that those tools and machinery are "deemed affixed to the mine."

Complainant, therefore, further submits that *none of the property mentioned in schedule "E" was subject to sale, or could be sold as "personal property."* And that defendant did not become the owner thereof at the execution sale of February 17, 1917, as claimed in the account.

C.

The property inventoried in schedule "E" of the account should also be considered from another and an entirely different standpoint.

Let it be summed for the purposes of this argument, that appellant did actually purchase it at the execution sale of February 17, 1917.

After this assumed purchase, appellant made no effort to remove its property, but left it on the real property, where and as it had been. And when appellant unlawfully took possession of the realty on March 3, 1917, it proceeded to use what it is thus assumed to have purchased, in the operation of that realty. Since then many repairs have been made on that property, and all the payments therefor are set forth in the account, and appellant seeks credit for the same.

If appellant were such owner, appellees submit that no credit can be given for the cost of repairs thereto. Appellant used its property not at the request or with the consent of complainant, or of his assignor, but solely of its own free will, and in the attempted accomplishment of its own unlawful purposes. On no theory of law or equity would complainant be chargeable with the cost of repairing or replacing any of such property as may have been injured, worn out or destroyed.

The fire of October, 1917, completely destroyed considerable of this property, and also seriously damaged and impaired more. Much of this was rebuilt and replaced by appellant, and the various items of cost in so doing are set up in the account, as claimed credits. So

that appellant asks credit not only for the cost of rebuilding and replacing destroyed property, which it claims to own, but also compensation for the use of such property as was thus rebuilt and replaced.

Under no conditions could appellant be entitled to reimbursement for its voluntary replacing of complainant's property. On what possible theory of law, equity or justice, then, can appellant found a claim of reimbursement for the cost of restoring its own destroyed property?

If appellant were the owner of the property inventoried in schedule "E," then that fact would be an additional ground for disallowing all payments for repairs thereto; and for the rebuilding or replacing of such as was destroyed by the fire.

EIGHTH POINT.

The Intervention of the Trustee Was Properly Permitted.

The intervention of "William H. Cochran as trustee for Pacific Crude Oil Company," was permitted under the provisions of Equity Rule 37, which, in part, is as follows:

"Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The intervention was primarily brought about by appellant's own argument and contention that "If the said report of the special master should be confirmed as filed, defendant (appellant) might be left subject to another suit or action by the said trustee, for the very same moneys, rents and profits." (Record, p. 476.)

On this contention being made, the honorable trial court itself suggested that the trustee should come in as a party to this suit. See Record, p. 361. And this intervention was accordingly had.

Appellant's arguments against the propriety of the allowance of this intervention will be briefly considered.

A.

The Intervention Was Not Too Late.

In a vain effort to support its contention that this intervention "came too late," appellant cites certain provisions of the California Code of Civil Procedure, and certain decisions thereon. And argues that as by the California Code intervention must be had "before the trial," the intervention in this suit was "too late."

It is, indeed, unfortunate that appellant has not yet discovered where this suit is pending. That it is not in the courts of California, but in the federal courts. And that the practice and procedure in these latter courts is regulated entirely by their own rules.

In as much as the rules of practice in equity—which govern the practice in this suit—distinctly provide that

intervention may be permitted “*at any time*,” it is impossible to even speculate on any grounds in support of appellant’s contention.

B.

The Petition to Intervene Did Not Require Any Answer. But, in Any Event, Appellant Was Given Ample Opportunity to Answer the Same.

Appellant concedes that it was given one day within which to answer the petition for leave to intervene; but argues that the honorable trial judge was guilty of “an abuse of discretion” in making such a limited allowance of time.

At the time this petition to intervene came on for hearing the court reporter was not present in court. Consequently, there is no full report of what then transpired. Appellees, however, endeavored to cover the proceedings at that time by the stipulation with appellant’s solicitors, which appears at pages 650 to 657 of the Record. On this subject this stipulation is as follows (Record, p. 653):

“It being further stipulated and agreed that at the hearing on the said ‘petition to intervene,’ on November 30, 1920, the said solicitor for defendants objected to the granting of the said petition without their being allowed to file their answer thereto; that the court then and there held that no answer to the said petition was necessary or required unless the said petition alleged new matter or things other than what was then already of record in the suit; that defendant’s solicitor then specified certain portions or allegations of the said peti-

tion which were claimed to be such new matter, and the court thereupon, of its own motion, ordered such designated portions and allegations to be stricken out of and from the said petition, as more particularly appears in the minutes of the court on that day; and that the court then and there also granted said defendants until 10 o'clock A. M. of December 1st, 1920, within which to file answer to the said petition, if they saw fit and desired so to do;"

The court minutes specified in this stipulation will be found at page 493 of the Record. They show what particular portions of the petition to intervene were objected to by appellant, as new matter, and, accordingly, were ordered stricken out.

Unless it be such stricken out portions, this petition presented no matters which had not been already presented in the suit and then already adjudicated upon.

So that this petition, presenting as it did but a resume of the facts and proceedings in this suit, presented nothing which was not already of record herein. It assuredly presented no new issues.

Said petition, therefore, did not need nor require any answer. Nor could any answer or defense be made to the there alleged facts than had been already made thereto.

In any event, the honorable trial judge properly exercised his discretion in fixing the time within which appellant should answer, "If they saw fit and desired so to do." No answer was filed.

C.

The Presence of the Trustee Was Necessary and Proper to a Complete Determination of the Cause.

It is a generally well recognized doctrine that

“When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case. *Equity will not permit litigation by peacemeal, but will determine the whole controversy, so as to prevent future litigation.*”

Watson v. Sutro, 86 Cal. 500.

In the trial court appellant urged the danger of further litigation against itself, in as much as the trustee was not a party to this suit and would not be bound by any decree herein. And then when the court makes the trustee a party to the suit, and in order to meet this objection, appellant says that the trustee should not have been permitted to come in. What appellant really is thinking is that it is sorry it got him in, for it cuts off at least one of appellant's resources for further litigation. Appellant reminds one of what in olden days was termed “a common scold.”

Appellant argues that the trustee “had no interest in the subject matter of this action,” and, therefore, it was error to permit him to intervene.

Appellees will rest their answer to this claim on the “interests” which are clearly and unquestionably shown by the petition to intervene (Record, p. 473), and to which this Honorable Court's attention is respectfully requested.

However, the portion of Equity Rule 37 which appellant has selected and *quoted* as the basis of its argument is an unfortunate selection, in as much as it applies strictly to the *original parties* to a suit. *And has positively nothing to do with intervenors.*

The portion of the rule which provides for intervention says:

“Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.”

In the trial court *appellant* most forcibly *urged that the presence of this trustee was necessary* to a complete determination of this cause.

Does appellant take back the claim that it then urged?

Appellees respectfully submit that, to avoid further litigation, the presence of this trustee was necessary or at least proper in this suit. And that he was properly permitted to intervene.

NINTH POINT.

The Master’s Report Adopted and Applied the Proper Rules of Law, to Appellant’s Accounting. And Said Report Was Properly Confirmed.

The special master’s report on appellant’s accounting of the rents and profits which it has collected and received, is entitled to great commendation. It exhibits great care and thoroughness in preparation.

With his report, the master also filed a "Memorandum Opinion." (Record, p. 399.) That opinion is a quite full presentation of the facts and the law involved on this accounting; and such facts and law are also most ably discussed and applied therein. It is deserving of the fullest and most earnest consideration.

That opinion so fully presents the rules and principles of law and equity on which the master founded and made his report, that but little, if anything, is left to be said by appellees on the subject.

There are, however, certain points in the proceedings before the master, to which appellees would further refer.

Complainant attacked defendant's account on two separate and different theories. First, that as Big Sespe Oil Company was a *wilful trespasser* on the property, it was not entitled to any allowances or credits for other than the taxes which it had paid on the property, which latter credit is provided for by section 702 of the California Code of Civil Procedure. The other theory was that, in any event, numerous items of the filed account were not properly allowable to defendant, even were it found that defendant's trespass on the property was not wilful.

The master adopted this first or general theory, and reported accordingly. His report also, however, segregates, classifies and reports on all the items of the filed account, although no allowance is made therefor, excepting, of course, for the taxes on the realty.

That the master himself found appellant to be a trespasser—and that such finding was made independent of any provision of the interlocutory decree—is clearly evidenced by the master's "Memorandum Opinion," which says (Record, p. 407):

"The special master is unable to discover in the record of the proceedings in this case, either in the District Court or upon the hearings before him, any evidence to justify the entry upon, or the use and operation of these oil lands by the Big Sespe Oil Company; nor upon the hearings before the special master, does there appear to have been made at any time any serious assertion that such entry, use and operation were sustained by any legal right. Further, the interlocutory decree, in paragraph 'Eighth' thereof, declares: 'The said purchaser, Big Sespe Oil Company, was not entitled to such possession or occupation of the said real property.' It seems, therefore, that the defendant's possession, occupation and operation of the property was illegal, and that the defendant was a trespasser thereon."

Defendant did not, either in the trial court, or in the proceedings before the master, offer any possible reason, excuse or attempted justification for its trespass. How, therefore, can the finding and conclusion that this trespass was *wilful*, be at all questionable.

Appellant now urges that no "force, threats or intimidation whatever was used by appellant in taking possession." The point of this is beyond understanding. Anyhow, appellant did not have to use any of these methods in its trespass. For was not Hornada—one of appellant's officers, directors and stockholders

—in charge of this property for Cochran, on March 3, 1917? And all Hornada did was to discharge his employer, Cochran; immediately enter into the employ of his own company, this appellant; and as Hornada, himself, testifies, he immediately *took possession* of the property for Big Sespe Oil Company.

Appellant further urges that, until the commencement of this action, "No objection or interference with said possession or occupation was made" by any of the parties in interest.

It is true that no formal legal proceedings were instituted to oust appellant from possession.

But it is not true that Cochran acquiesced in or approved of such possession by appellant. The testimony unquestionably establishes that in the unduly prolonged and futile negotiations with appellant, and in his futile efforts to procure from appellant a statement of what appellant claimed should be paid to it, Cochran was objecting to appellant's possession of the property, and was trying to get appellant out of such possession without resorting to legal proceedings, and becoming subject to the usual delay and expense thereof, such as has finally been forced on him by appellant's misconduct.

Appellant also urges the hardship of the enforcement of the doctrine or rule applied in this suit. As a learned judge once well said, appellant "*can but reflect on its own rashness.*" Appellant could and should have observed the well established law. And all its rights in the premises would then have been fully and legally

protected and satisfied. But appellant saw fit, in its lust to acquire this property without any consideration, not only to ignore the law, but to forcibly and knowingly violate it, by seizing and entering upon these lands, without even a suggestion of right or authority, and then operating them as it saw fit, and always as it deemed would best accomplish its ends.

It is with poor grace that such a plea comes from appellant, after its concededly unlawful acts which required the application and enforcement of the rule appellant now inveighs against.

However, if this rule is compared with the other rules of law as to allowances and credits in analogous accountings, it will be readily seen that this rule is not so harsh as, at first glance, it might seem to be. For even under such other rules, but few of appellant's claimed disbursements would be allowable as credits on this accounting.

Summarizing these various rules and allowances and credits, it will be seen that there is no conflict whatsoever between them, as they are based on entirely different conditions, and on different principles of law.

1. *If the trespass be wilful*, then the trespasser is not entitled to allowance for either repairs, improvements or even cost of operation and production.

2. *If the trespass be unintentional, by proven honest mistake*, the trespasser will be allowed only his actual expenses in procuring the production.

3. *If one be lawfully in possession* of the real property, in any other capacity than as a tenant, and in the absence of any specific agreement with the owner of the property, to the contrary; he will be allowed credit for only such repairs as were necessary for the preservation of the estate, and for no improvements whatsoever.

Appellees also submit that where any improvements are made on the property, by the trespasser—whether the trespass be wilful or unintentional—such improvements become the property of the owner of the land, without any liability to account therefor. Moreover, under none of these rules, can there be any claim for the cost thereof.

The cases cited in the master's "Memorandum Opinion" are sufficient authority for this first rule.

As authority for the second of these rules, appellees would cite:

St. Clair v. Cash Gold Mining & Milling Co.,
47 Pac. 466;

Durand Min. Co. v. Percy Consol. Min. Co.,
93 Fed. 166;

E. E. Bolles Woodenware Co. v. U. S., 106
U. S. 432, 27 L. Ed. 230.

The third rule is fully likewise stated in 27 Cyc. 1265. And numerous cases are there cited as authorities for the same.

In support of appellees' contention that the cost of "improvements" are not allowable, see:

Mahoney v. Bostwick, 96 Cal. 53, 30 Pac. 1020.

The summary result of these authorities is:

1. That *under no conditions would appellant be entitled to credits for "improvements" on the property.*

2. That *even if lawfully in possession of the property—as it concededly was not—appellant would not be entitled to credit for "repairs," unless the same were "necessary for the preservation of the estate":*

3. That *even though appellant's trespass had been proven to be excusable, appellant would be allowed only its actual and necessary expenses in producing the oil from this property; and*

4. That *if appellant's trespass was wilful—as has been properly found because there was no proven excuse or justification therefor—appellant is not entitled to any allowances or credits whatsoever, excepting for the paid taxes.*

Some of the Salient Established Matters in This Suit.

A.

Appellant has not presented a single meritorious defense to this cause of action. Nor any defense to the merits of the cause which is not purely and simply a technical question of pleading, of practice, or of evidence.

B.

Appellant had no right to the possession or occupation of this property. Yet appellant knowingly and wilfully took such possession, and assumed such occupation. Appellant, consequently, was a trespasser.

C.

Appellant offered no testimony whatsoever to show that such possession and occupation was unintentional or through any mistaken notion of its rights. Consequently, the finding that appellant was a *wilful trespasser* was duly and properly made.

D.

Appellant deliberately and wilfully attempted to increase the amount of the required redemption money, so as to make such redemption prohibitive, or, at least, financially undesirable.

This is shown not only by appellant's conduct and management and operation of the property, but also by numerous items of its account, which appellant sought to have allowed as credits against this redemption money. To discuss all such items, would be to unduly tax the patience of this Honorable Court. Some few will, however, be referred to, so that the true character of the account, and appellant's purposes may be appreciated as the master has found them to be.

Officers' Salaries. Schedule "D" of the account presents certain payments to Clampitt, Mills and Hornada,—appellant's corporate officers — approximating

\$1900, which are asserted to be for "Back Salary" which was voted to themselves, some months subsequent to the time that the services were asserted to have been performed.

The law as to such claimed allowances is well settled.

It is a well settled rule that, under no conditions, would appellant be entitled to compensation for its services in the care and management of this property. See:

Benham v. Rowe, 2 Cal. 387, 56 Am. Dec. 342;

Moss v. Odell, 141 Cal. 335, 74 Pac. 999;

Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93.

Moreover, the master has found (Record, p. 438) that through these so-called "Salary" payments, appellant deliberately attempted to foist the amounts of such payments on the redemption money, while, as clearly shown by the evidence, there were really and, in fact, "*Dividends*."

It is most significant that appellant took no exception to this finding of the master. Nor has appellant assigned any error thereto.

It is also significant that appellant took no exception to the master's disallowance of the payments of so-called "Back Salary" to Mills and Hornada. Nor did appellant assign any error to such disallowance.

Appellant's exception and assigned error are limited to the payments to Clampitt; and even those are based on the theory of *quantum meruit*, and not on the resolution of appellant's directors, under which such payments were at first asserted to have been authorized.

Miscellaneous Payments. Under the heading of “*Miscellaneous Taxes*,” appellant sought allowance for taxes on its “own business and affairs, in no way connected with the subject matter of this suit.” (Master’s Report, Record, p. 427.) Under the heading of “Bond Premiums,” appellant sought allowance for premiums on a bond which it was obliged to give because of its unlawful possession of this property. (Master’s Report, Record, p. 428.) Unquestionably the most audacious claim for reimbursement comes under the heading of “Interest on Bank Loans.” (Record, p. 428.) The testimony shows that these loans were procured to pay the fees of appellant’s attorneys in the prosecution of the very litigation involved in this suit; and also to pay the costs of the sheriff on this execution sale of March 3, 1917. Such audacity could be surpassed only by appellant’s asking allowance for the cost of the sheriff’s deed which has been adjudged void.

Improvements on the Property. The evidence unquestionably establishes that all the conceded “*Improvements*” and practically all so-called “*repairs*,” outside of just the usual and ordinary ones, *were made since the commencement of this suit*. In other words, the purpose was, as said in some judicial decision, “To improve the owner out of his redemption,” by wrongfully increasing the burden thereof.

Without discussing further items of appellant’s account, appellees respectfully submit that the evidence clearly establishes appellant’s wilful attempt to wrong-

fully increase the amount of credits and allowances, and thus also increase the amount of the required redemption money.

Not satisfied with this wilful attempt to wrongfully increase the credits and allowances on the redemption money, appellant also actually did wilfully decrease the income from the property.

Decrease of Income From the Property. The evidence shows that immediately after the commencement of this suit on July 2, 1919, the average monthly income from the sale of the oil produced from this property, fell off or was reduced, and that, too, in the face of the fact that the selling price of this oil was several times increased. (See summary of oil runs, "Complainant's Exhibit No. 8," Record, p. 620.) A comparison of the number of runs made in each month since June, 1919, with the number made in the preceding months and subsequent to March, 1917, shows a most striking variation and decrease. And a like comparison of the average monthly production shows a decrease of over one-third in the production after June, 1919. And it is clear from Hornada's testimony that this reduced production cannot be attributed to any trouble with either of the then producing wells, numbers 3 and 4. If any explanation is required of this falling off in production, and the consequent loss of income from the property, it is given in the master's finding that such reduction in income was entirely due to appellant's wilful failure to pump the wells on the property, as they could and should have been pumped.

(Record, p. 453.) Complainant made a point of this fact, before the master, and claimed that appellant should be charged on this accounting, not only with the moneys actually received from the sale of the produced oil, but also with what the property would have earned if it had been operated as “a provident owner could and would have done.” (See *Murdock v. Clarke*, 90 Cal. 427, 438, 27 Pac. 278.) While the master found that appellant had not operated the property as it could and should have done, he found that complainant’s claim for these further charges was too remote; and, on that ground only, disallowed the same. (Record, p. 452.) The master’s reasons for this finding is fully set forth in his memorandum opinion (Record, p. 410.) Appellees have bowed to the master’s finding and conclusion. And yet, appellant has the effrontery to ask, “How can it be said that complainant or the judgment debtor was in any wise injured by the possession of appellant?” *There are none so blind as those who will not see.*

TENTH POINT.

The Profits Collected by Appellant, Over and Above the Amount of the Required Redemption Money, Were Properly Ordered to Be Paid Into Court.

It appears that the moneys collected and received by appellant from the sale of the oil produced from this property, not only satisfied and paid all that ap-

pellant was entitled to receive on this redemption, but also were in excess thereof. And by the final decree herein, appellant was required to pay such surplus moneys into court, "Pending this court's further order as to the final disposition thereof." (Record, p. 501.) The Honorable Trial Judge's expressions of opinion on this subject are found at page 361 of the Record.

As appellant had been fully paid all of its redemption money, can it be seriously questioned but that appellant should pay these surplus moneys into court for further and final disposition? Appellant certainly had no claim or right to them.

In the court below, complainant argued that by virtue of the assignment of the right of redemption, he was entitled to receive these surplus moneys. And he based his contention on the case of

Gordon v. Lewis, 10 Fed. Cas. No. 5613, 2 Summ. 143.

In that case, the bill did not assert any title to such surplus rents and profits. And the question was whether they followed the equity of redemption. In its opinion, the court says:

"That they do attach to such ownership *de jure*, in the view of a court of equity."

In submitting this question, appellees would say that they do not contend that it is really before this Honorable Court, unless in its wisdom, and to avoid further litigation, this Honorable Court deems it best to consider and pass on the same.

ELEVENTH POINT.

Appellees respectfully submit that the final decree herein should be affirmed as entered.

TWELFTH POINT.

Complainant's Objections to the Filing of the Statement of the Evidence. Also Complainant's Objections to the Extensions of Time for Filing the Record on this Appeal.

Complainant filed in the court below certain specific objections to the lodgement and to the filing of the "Statement of the Evidence" on this appeal. (See Record, p. 365.)

Complainant also filed further objections to the granting of a certain order extending the time within which to file the record on this appeal. (See Record, p. 650.)

This Honorable Court's consideration of all these objections is respectfully requested.

The filing of the "Statement of the Evidence." Complainant's objections to the lodgement, approval and filing of this statement are set forth in detail in the filed "objections." The substance thereof is that this statement was neither lodged, approved or filed during and before the expiration of the term in which this appeal was allowed; and that the order purporting to continue such matters until the next term, "was made without due or any lawful authority whatsoever therefor."

In support of these objections, appellees contend as follows: 1. That the statement must be filed during the term in which the appeal is allowed; 2. That the Honorable District Judge was without lawful authority to extend that term; and 3. That, while in terms this order purported to "*continue* the matter * * * to the next term," it really and in fact either operated as a continuance of the term, or permitted the doing of an act after the expiration of the time contemplated therefor by the statutes.

That the ending of a term also terminates all then pending unfinished matters, is evidenced by the saving provision in section 8 of the Judicial Code. That section provides, in fact, as follows:

*"When the trial or hearing of any cause * * * in a district court has been commenced and is in progress before a jury or the court, it shall not be stayed or discontinued by the arrival of the time fixed by law for another session of said court; but the court may proceed therein and bring it to a conclusion in the same manner and with the same effect as if another stated term of the court had not intervened."*

If pending and unfinished matters could be continued beyond term, or could the term itself be extended, there certainly would have been no necessity for this express statutory provision. The very limited scope of even this provision is also worthy of consideration on this general question.

Appellees are familiar with the "*per curiam statement*" of the Circuit Court of Appeals for the Sixth

Circuit on this general question, and which is reported in 222 Federal, at page 884.

The fact that what is there said by the Honorable Appellate Court is no more than a "statement" of that court's conclusions, and, even giving to that statement the most respectful consideration, it certainly is not an adjudication on the question here submitted. Therefore, the questions presented by complainant's objections are respectfully submitted for this Honorable Court's consideration and determination.

Orders Extending Time for Filing Record. Appellant procured from the Honorable District Judge certain *ex parte* orders extending appellant's time for filing the record on this appeal. Complainant's above mentioned filed "objections" set forth in detail the grounds of the questions which they consider raised by the making of these orders as was done.

The Honorable District Judge undoubtedly was given full power and authority to make these orders by rule 16 of this Honorable Court.

The questions raised by appellees in connection with these orders are, may such orders be made *ex parte*? And if so, must not notice thereof be given to the other party?

This rule 16 is silent as to any notice of an application for an order such as the one in question. The only requirement of the rule being that the order shall be "filed with the clerk of this court."

But in any event, this rule unquestionably is subject to the General Equity Rules of Practice as adopted by the Supreme Court.

By equity rule 1, it is provided that any district judge, "upon reasonable notice to the parties," may

make orders “whenever the same are not grantable of course.”

Equity rule 5 describes what motions are “grantable of course by clerk.” Orders such as those now under consideration are not included with the provisions of this rule.

Appellees, therefore, respectfully submit that these orders of extension were not properly granted as no notice of the application therefor was given to the appellees.

Equity rule 4 further provides that “When an order is made without prior notice to, and in the absence of, a party, the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be made in the equity docket, which shall be taken as sufficient proof of due notice of the order.”

Particular consideration should also be given to the first sentence of this rule 4, which provides that the mere noting of an order in the docket shall not be deemed notice to the parties or their solicitors. This is an absolute reversal of the old equity rule 4, which provided that the entry in the order book was sufficient notice to a party.

In this cause appellees had neither any notice of the application for these orders, nor did they ever receive any notice of the making thereof.

There are three practical aspects of the questions presented by complainant’s “objections,” to which attention is particularly directed.

1. That if the other party was given notice of the application for an order extending time, in very many

instances he could present facts to the judge which would show that there was no “good cause” for the granting of the order.

2. Even if the order were granted *ex parte*, but a party has notice of the entry thereof, within a reasonable time, he could move to vacate the same, if it was advisable or necessary so to do.

3. If a party has neither notice of an application for the order, nor any notice of the entry thereof, counsel is either bound to inquire from the clerk of this Honorable Court—usually at some distant point—if such an order has been made and filed, or wrongfully to assume that there had been a default in the prosecution of the appeal. In the latter case, he unquestionably would be put to considerable unnecessary trouble and possible expense.

All these questions are submitted to this Honorable Court in the hope that even if this court should hold that the questions are not relevant to the merits of this appeal, the court will at least definitely prescribe the proper practice to be pursued, and thereby save the future uncertainty, not only of the Honorable Judges themselves, but also of the counsel for litigants in general.

All of which is respectfully submitted.

THEODORE MARTIN,

Solicitor for Appellees.

WM. H. COCHRAN,

Of Counsel.

IN THE ²
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corpora-
tion,

Appellant,

vs.

William H. Cochran, a Citizen of the
State of New York, and William H.
Cochran, as Trustee for Pacific
Crude Oil Company,

Appellees.

PETITION FOR REHEARING OF APPEAL

DUDLEY ROBINSON,
A. I. MCCORMICK,
Attorneys for Appellant.

No. 3666

IN THE

United States

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William H. Cochran, a Citizen of the
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Crude Oil Company,

Appellees.

PETITION FOR REHEARING OF APPEAL.

Upon appeal from the United States District Court
for the Southern District of California, Southern
Division.

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

The above named appellant, Big Sespe Oil Com-
pany, a corporation, having been apprised of the de-
cision of this Honorable Court upon the above entitled
appeal as set forth in its opinion filed on the 3rd day

of October, 1921, petitions for a rehearing of said appeal in order that re-consideration may be given two certain points of controlling force in the decision of this case and of vital importance in the structure of the law.

We feel that the fact has escaped the attention of this Honorable Court, that the present action is brought by William H. Cochran as assignee of Pacific Crude Oil Company, and not by or on behalf of Pacific Crude Oil Company, the judgment debtor.

The decisive point in this case, therefore turns upon the construction of section 701 of the California Code of Civil Procedure which, as set forth on page 15 of the aforesaid opinion, we respectfully submit enlarges the classes of persons who may redeem from execution sale beyond the terms of the statute and the decisions of the California state courts. That section provides that property sold on execution may be redeemed by "the judgment debtor, or his successor, in interest in the whole or any part of the property."

The judgment debtor has the right of redemption, during the redemption period, at all events and without qualification. The statute so provides, as to him, and stops there. Accordingly, the California Supreme Court in the case of Yoakum v. Bower, 51 Cal. 539, 540, held that "a defendant in execution can redeem from an execution sale, notwithstanding he has conveyed to another the property sold under execution."

This does not bear the construction that an assignee of the right to redeem can exercise that right, notwithstanding the judgment debtor has conveyed to yet another person the property sold under execution. Neither does that court's decision bear the construction that the assignee of the right to redeem might redeem notwithstanding he was not the successor in interest of the judgment debtor in the whole or any part of the property.

The clear limit of that decision was that the right to redeem, independent of interest in the property, was vested by the statute peculiarly in the judgment debtor, *as such*. It said:

“The successor in interest may redeem, but the judgment debtor may also do so. The statute provides that the judgment debtor, as such, may redeem; not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution.”

So far as we have been able to find, no California decision has held that a judgment debtor, possessing no title, could assign the bare right of redemption, and invest an assignee, devoid of any “interest in the whole or any part of the property,” with the right to redeem. It has not been held that he could effectively transfer the right to redeem and retain title to the property. It has not been held that any person, other than the judgment debtor having an interest in the property, might redeem, unless he be the judgment

debtor's successor in interest in the whole or any part of the property.

In the case of Southern California Lumber Company v. McDowell, 105 Cal. 99, cited in the opinion of this Honorable Court, the assignee of the judgment debtor was the successor in interest of the judgment debtor in a part of the property. Thus he came within the language of the statute. We respectfully submit that the limit of that holding was that the successor in interest need not have vested in him the whole of the property. It could not be said that the court would have held the assignee to be entitled to redeem if he had possessed no interest in the property. The court clearly recognized the fact that some interest was necessary in order to vest this purely statutory right because in conclusion it used this language:

“Therefore, conceding, as we must, that the hotel company had a sufficient interest in the property to entitle it to redeem the whole block, notwithstanding its conveyance of the nineteen lots to the San Diego, Eastern & Terminal Railway Co., it must follow that it (the judgment debtor) could convey or assign such interest to Swayne, ‘for the purpose of having the certificate of redemption of said property from said sale issued in his name,’ as expressed in the deed to Swayne, and thereby authorize and entitle Swayne to make the redemption in his own name as he did.”

The interpretations of the two phases or aspects of this statute, found in the above quoted cases, to-wit, first, that the judgment debtor, as such may redeem, notwithstanding he has conveyed to another the property sold under execution, and, second, that the judgment debtor's successor in interest to a part (but not all) of the property, may redeem, do not support the proposition that a person who is neither the judgment debtor nor the successor in interest, in the whole or any part of the property, may redeem. They do not support the proposition that the bare right of redemption, residing peculiarly in the judgment debtor, "*as such*," is enforceable by or through as assignee.

Later in the opinion this Honorable Court states, as the trial court held, that, "when the execution sale was had, Cochran was the holder and owner of the legal title to the property in actual possession and operating the same. The Pacific Crude Oil Company had then no right of possession." If the redemption is adjudged in this action in favor of William H. Cochran as assignee of Pacific Crude Oil Company, we respectfully submit that the decision of this case will have the effect of enlarging the scope of said section 701 to permit redemption to be made by the judgment debtor, and also his assignee of the right of redemption, as well as his successor in interest in the whole or any part of the property. Under such construction the judgment debtor undoubtedly would be permitted to convey his interest in the property to one person and assign his right of redemption to

another person. We respectfully submit that in order to qualify the complainant in this case to redeem the property the statute would have to be construed to read that redemption might be made by the judgment debtor, or his successor in interest in the whole or any part of the property, or his assignee of the right of redemption though not succeeding him in any interest in the whole or any part of the property. As we view it, this must create a class not mentioned in the statute, and be destructive of the purpose and intent of the statute to require certain particular qualifications, therein provided, as prerequisites to redemption by any persons except the judgment debtor.

Not being entitled to redeem, William H. Cochran in his capacity as assignee should be denied the accounting prayed for in the bill of complaint. Speaking of a provision in subdivision 2 of the above mentioned section 701 of the Code of Civil Procedure, the California Supreme Court in *Bangham v. Michael*, 179 Cal. 390, 392, denying to a bank the privileges of a redemptioner said:

“The right of the holder of a junior lien to redeem property sold under a decree of foreclosure of a prior mortgage thereon is purely statutory and in the absence of a compliance therewith, a tender of the money required to redeem is wholly ineffectual for the purpose.”

In the case of *Eldridge v. Wright*, 55 Cal. 531, 533, the court said, “the right to redeem exists only by virtue of the statute, and under its provisions we must

find the measure of right.” We respectfully submit that the courts of the state of California have uniformly construed this statute strictly within the terms of its language, never following exceptions or special cases until the diverging lines of interpretation permitted the creation of an additional class of persons entitled to redeem. The danger of producing such a result by the decision of the present case is, we believe, and respectfully submit, of a gravity which would justify a re-consideration of this appeal.

The second point affects the theory upon which the amount of recovery is ascertained. As above stated this Honorable Court has in its opinion stated that the Pacific Crude Oil Company had no right of possession. Yet the rule of trespass is invoked in favor of the Pacific Crude Oil Company. At page 17 of the opinion of this Honorable Court it is said:

“In the present case the judgment debtor, not in possession, may have had a right to obtain possession under certain conditions and in a lawful manner, but under no circumstances did the Pacific Crude Oil Company have more than a qualified estate which it had not reduced to possession. The District Court so held and advanced to the logical conclusion that inasmuch as the Big Sespe Oil Company had no right to possession its possession became a trespass.”

The affirmance of the decree in this cause would result in depriving this appellant of two hundred forty-five (245) acres of valuable oil producing lands originally owned by it, which was not paid for in full, and

of depriving it of the benefit, and penalizing it to the extent of the major portion of its judgment for part of such purchase price, in addition to requiring appellant to pay to the alleged assignee of the delinquent debtor the sum of approximately four thousand (\$4,000.00) dollars.

We respectfully suggest that as between the Pacific Crude Oil Company and the Big Sespe Oil Company it would have been impossible for the latter to commit trespass against the former. Trespass is a violation of the right of possession. It occurs to us and we respectfully suggest that if this Honorable Court, scrutinizing the basis of right of the Pacific Crude Oil Company to claim trespass, should find it impossible to declare that right to exist without declaring this to be an exception to the rule of possession, not heretofore declared, a reconsideration of the case might be required upon this point alone. Whether Mr. Cochran in his capacity as trustee could sustain a claim for trespass would depend, if the question were litigated, upon the facts as to estoppel by his knowledge and conduct. The very argument upon which this Honorable Court finds that Cochran was recognized by the Big Sespe Oil Company as the representative of the Pacific Crude Oil Company for several years prior to the execution sale and during the year thereafter, would support the contention that he knew of and did not protest against the occupation and operation by the Big Sespe Oil Company if indeed he did not actually acquiesce therein. That aspect of

the case was not tried, not being in issue, except as it was latterly presented under the complaint in intervention, which was presented and acted upon within a few hours immediately preceding the signing of the final decree and without trial. The theory of holding the defendant under the severe rule of trespass was first discussed before the Special Master. As stated in the opinion of this Honorable Court on page 9:

“Cochran’s evidence is that after the sale of the property on March 3, 1917, he conferred with the secretary and treasurer of the appellant as to what could be done with the situation into which affairs had drifted; that toward the fall of 1917, he told the secretary and treasurer that he wished a statement of what moneys appellant had received from the property and what expenses had been incurred so that he would know what moneys were necessary to redeem the property.”

The Special Master was disturbed by consideration of the present question is indicated by the concluding remarks of his memorandum of opinion as it appears on page 418 of the transcript of record where, among other things, he says:

“If, as asserted by the complainant, the defendant acquired no rights in or to these oil lands, by virtue of the execution sale, because the title was vested in Mr. Cochran as trustee, whom the judgment did not affect, and if Cochran as trustee is the legal owner of the lands, and of the oil extracted therefrom, then why should the defendant account in this action to Cochran individually?”

Neither Cochran nor the Pacific Crude Oil Company could have extracted the oil from the land without heavy expense. The harsh rule mulcting the defendant not only of the actual profits from the use of the property but also of all the moneys expended in the operation thereof certainly must be limited to invocation by or in favor of a person entitled to the possession of the property.

For the foregoing reasons the appellant respectfully requests a rehearing of this cause upon appeal and a reconsideration of the decision of this Honorable Court to the end that the disposition of this case may be in accordance with the principles above set forth.

Respectfully submitted,

Dated October 31, 1921.

DUDLEY ROBINSON,

A. I. McCORMICK,

Attorneys for Appellant.

The undersigned, Dudley Robinson, one of the counsel for the appellant in this cause, hereby certifies that the foregoing petition for rehearing is, in his judgment, well founded in law and that it is not interposed for delay.

DUDLEY ROBINSON,

Counsel for Appellant.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corpora-
tion,

Appellant,

vs.

William H. Cochran, a Citizen of the
State of New York, and William H.
Cochran, as Trustee for Pacific
Crude Oil Company,

Appellees.

Answer of Appellees to Petition for Rehearing of Appeal.

THEODORE MARTIN,
Solicitor for Appellees.

WM. H. COCHRAN,
Of Counsel.

FILED

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F. D. MONTGOMERY



No. 3666

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Big Sespe Oil Company, a Corporation,

Appellant,

vs.

William H. Cochran, a Citizen of the
State of New York, and William H.
Cochran, as Trustee for Pacific
Crude Oil Company,

Appellees.

Answer of Appellees to Petition for Rehearing of Appeal.

*To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

The above named appellees, William H. Cochran and William H. Cochran as trustee for Pacific Crude Oil Company, availing themselves of the privilege so graciously accorded to them by your Honorable Court, make and respectfully submit this as their answer to

the appellant's petition for a rehearing of its appeal in the above entitled cause, and they also say as follows: follows:

Appellant's petition confines and limits its sought-for rehearing to the reconsideration of your Honorable Court, of "two certain points." (Petition, p. 4.)

Summarily stated, these two points are:

1. That the assignee of the judgment debtor's mere right of redemption cannot make or enforce such redemption, for to permit him so to do would "enlarge the classes of persons who may redeem from execution sale beyond the terms of the statute and the decisions of the California state courts." (Petition, p. 4.)

2. The asserted incorrectness of "the theory upon which the amount of recovery is ascertained" by the final decree appealed from, and as affirmed by your Honorable Court. (Petition, p. 9.)

To these two points and to each of them, appellees make answer as follows:

FIRST: Each and both of these points was fully presented and argued by appellant's counsel in their brief on this appeal. (Appellant's Brief, pp. 66-69, and pp. 52-61.)

These two several points were also fully presented and argued by appellees. (Appellees' Brief, pp. 99-106, and pp. 129-140.)

These two several points are also fully presented, ably discussed and decided by your Honorable Court

in its filed opinion on this appeal. (Opinion, pp. 15, 16 and 19.)

Appellant's petition for a rehearing is devoid of any facts, authorities or argument that were not presented in its filed brief on this appeal and which have not been already considered and passed upon by your Honorable Court in your filed opinion.

SECOND: Appellees refrain from making answer to the insidious statement or suggestion in appellant's petition (p. 4) that it "has escaped the attention of this Honorable Court" that Cochran is suing in his own right, and not by or on behalf of his assignor, the judgment debtor.

The opinion which has been filed clearly shows in several different places, and in express language, that your Honorable Court fully and correctly recognized and stated Cochran's claims and rights in this suit. How, therefore, can appellant really "feel" that such claims and rights may have "escaped the attention of this Honorable Court"?

THIRD: To permit the assignee of the judgment debtor's right of redemption, to redeem, does not enlarge the classes of persons who may redeem under the statute, in as much as the assignee is simply substituted for, and simply stands in the place and stead of the judgment debtor, and, by virtue of the assignment, becomes clothed with all the rights, powers and authorities of his assignor in the premises. The assignee, consequently, cannot be considered as any

additional class. He is but the substitute or representative of the judgment debtor.

FOURTH: To sustain appellant's contention that because the statute does not say in express language that the judgment debtor "or his assignee" may redeem, no enforceable assignment can be made of the judgment debtor's mere statutory right of redemption, would be to hold that no statutory right is enforceably assignable,, in as much as no statute specifically refers to the "assignee" of the party to whom any right is primarily given. Such enforceable right of assignment exists in all instances, "subject only to general laws." (California Civil Code, Sec. 679.) And there is no "general" or other laws qualifying or limiting the judgment debtor's "absolute ownership" of this right of redemption, or the judgment debtor's right to "dispose of it according to his pleasure." (California Civil Code, Sec. 679; see also, Appellees' Brief, pp. 104, 105.)

To sustain this contention of appellant would also be to refuse recognition of the provisions of the California Civil Code as to property in statutory rights, and assignable rights over property, which are so fully presented and ably discussed in your Honorable Court's opinion on this appeal, as to preclude the necessity of further presentation.

The fact that the statute gives the right of assignment, and clothes the judgment debtor's assignee with his assignor's full rights, powers and authorities in

the premises, fully explains the absence of decisions thereon. Appellant's contention that your Honorable Court's decision on this point is erroneous because there are no California decisions to directly and specifically support it, is hardly fair in as much as there are no such decisions either PRO or CON directly on the point. The right exists by statute, and is in no way dependent upon judicial decisions for its existence. Moreover, such decisions as have been cited, fully sustain by reasoning, analogy and principle the correctness of your Honorable Court's decision on this point.

The argument in appellant's petition that Cochran could not redeem because he was "devoid of any interest in the whole or any part of the property" (Petition, p. 5), is not only without merit, but is also based on any absolutely false assumption of fact.

This is exactly the same point as was presented in appellant's brief on this appeal (p. 66), when appellant argued that the judgment debtor's assignee was not entitled to redeem "unless he has an interest in the whole of the property, or some part thereof."

Appellant has always conceded, and it was likewise so determined by the trial court, and by your Honorable Court, that WILLIAM H. COCHRAN, PERSONALLY, HELD THE LEGAL TITLE TO THIS PROPERTY AT ALL THE TIMES INVOLVED IN THIS CAUSE. Cochran was not, therefore, devoid of any interest in this property, as suggested in appellant's petition. On the contrary, he was the owner and holder of the legal title to the property in question; and was entitled to, and was in

actual possession thereof until appellant's unlawful entry thereon.

FIFTH: Section 701 of the California Code of Civil Procedure, which provides for redemption by the "judgment debtor, or his successor in interest, in the whole or any part of the property," clearly establishes the propriety and correctness of your Honorable Court's decision that the right of redemption is a personal right, and does not run with the land. And because such right does not run with the land, the right of redemption is given by statute also to the purchaser of the land.

But it would be difficult to find any line of argument, let alone reasoning that would justify the finding that because the statute specifically gives a right of redemption also to the purchaser of the land, it was thereby inferentially intended to in any way limit or curtail the judgment debtor's legal and statutory rights, powers and authority over his property, *viz.*, the right of redemption and the sale and transfer thereof.

SIXTH: The assertions in appellant's petition of its theories of trespass, are most fallacious.

That appellant wilfully and unlawfully entered upon and took possession of this property, has been repeatedly found and determined by the learned district judge, the special master, and also by your Honorable Court. And appellant has never even attempted to

offer any justification or excuse for its wilful and illegal misconduct.

That trespass was committed against William H. Cochran, who was the owner and holder of the legal title to this property, and while he was in actual possession of the property. And it is that William H. Cochran who is prosecuting this suit.

SEVENTH: Appellant's inveighment against the rule of allowances, and its plea for more merciful consideration, are not entitled to any consideration. Appellant knowingly and wilfully committed trespass. The special master's "memorandum opinion" sufficiently elucidates this trespass and appellant's subsequent further wilful and outrageous attempts to unlawfully retain this property for itself. For such trespass there is but one rule of law. And such rule has been uniformly and always applied to appellant throughout the hearing and appeal of this cause. Appellant has but its own wilful and aggravated alleged misconduct to blame for the enforced application of the rule.

The statement in appellant's brief that this property "was not paid for in full" is untrue. The only moneys owing to appellant for this property were the \$15,000 which has been fully allowed and paid together with the statutory interest of one per cent (1%) per month thereon.

EIGHTH: Appellant's petition presents no grounds for a reconsideration of this appeal which have not

been already fully argued, and been passed upon by your Honorable Court.

To grant the sought-for rehearing would be to permit appellant to still longer continue his unlawful possession of this producing oil property, and to still longer unduly deprive complainant of the enjoyment of his adjudicated rights in the premises.

NINTH: Appellant's petition for a rehearing of this appeal should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated November 7, 1921.

THEODORE MARTIN,

Solicitor for Appellees.

WM. H. COCHRAN,

Of Counsel.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH ROSENTHAL,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Northern Division of
the United States District Court of the
Northern District of California.

FILED
APR - 1 1931
F. O. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Northern Division of
the United States District Court of the
Northern District of California.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

For Plaintiff and Defendant in Error:

UNITED STATES ATTORNEY, San Francisco, Cal.

For Defendant and Plaintiff in Error:

JOSEPH E. BIEN, Esq., and JOHN B. CLAYBERG, Esq., San Francisco, Calif.

District Court of the United States, Northern District of California, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

Praeipice for Transcript on Writ of Error.

To the Clerk of the Above-entitled Court:

You are hereby directed to prepare the transcript on return to a certain writ of error, issued on January 20, 1921, to review a final judgment heretofore, and on December 2, 1920, entered against defendant, Joseph Rosenthal, and to have the same in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, on March 28, 1921.

Said transcript shall consist of the following papers now on file in your office in the above-entitled action:

1. Indictment.
2. Plea of Joseph Rosenthal.
3. Verdict.

31½. Motion for new trial.

4. Judgment.
5. Assignment of error.
6. Petition for writ of error.
7. Order directing issue of writ of error.
8. Supersedeas or bail bond.
9. Cost bond.
10. Bill of exceptions.
11. Praecept and stipulation for transcript.
12. Clerk's certificate.

Dated this 9th day of March, 1921.

JOS. E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error, Joseph Rosenthal.

It is hereby stipulated and agreed that the transcript on the return to the writ of error heretofore, and on January 20, 1921, issued from the final judgment in said action, shall be [1*] made up of the papers and files specified in the foregoing Praecept.

Dated this 9th day of March, 1921.

FRANK M. SILVA,

U. S. District Attorney.

JOS. E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error, Joseph Rosenthal.

Approved:

HUNT,

Judge.

[Endorsed]: Filed March 9, 1921. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the Northern Division of the United States District Court for the Northern District of California, First Division.

Indictment.

Violation Act. Feb. 13th, 1913.

At a stated term of said Court begun and holden in the City of Sacramento, in the County of Sacramento, in the Northern Division of the Northern District of California, on the second Monday of April, in the year of our Lord one thousand nine hundred and twenty,

The Grand Jurors of the United States of America, within and for the Division and District aforesaid, on their oaths present: THAT

JOSEPH ROSENTHAL, MORRIS ROSENTHAL and ARTHUR F. FITCH, hereinafter called the defendants, heretofore, to wit, on or about the tenth day of November, A. D. 1919, at Sacramento, in the county of Sacramento, in the Northern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, knowingly and feloniously buy and receive thirty-nine (39) cases containing 5,000 cigarettes each, which said 39 cases of cigarettes were of the approximate value of \$1,462.50 in lawful money of the United States, and which said 39 cases of cigarettes had theretofore been unlawfully stolen, taken and carried away from a certain railroad car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, by M. H. Young and F. W. Laveque, the said 39 cases of cigarettes at the time they were so

stolen, taken and carried away constituting a part of a shipment of freight in interstate commerce over the lines of railroad of the said Southern Pacific Company, and consigned by John Bollman & Company of San Francisco, California, to Coast Cigar Company, Lang & Company, Hart Cigar Company, and T. W. Jenkins, all of Portland, [3] Oregon; that at the time and place aforesaid, the said defendants then and there well knew that the said 39 cases containing 5,000 cigarettes each had been theretofore stolen, taken and carried away from said railroad car, as aforesaid.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided,

SECOND COUNT.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further present: THAT

JOSEPH ROSENTHAL, MORRIS ROSENTHAL, and ARTHUR F. FITCH, hereinafter called the defendants, heretofore, to wit, on or about the tenth day of November, A. D. 1919, at Sacramento, in the county of Sacramento, in the Northern Division of the Northern District of California then and there being, did then and there unlawfully, wilfully, knowingly and feloniously receive and have in their possession, knowing the same to have been stolen from a freight-car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, certain goods and chattels, to wit, thirty-nine (39) cases containing 5,000 cigarettes each, of the ap-

proximate value of \$1,462.50 in lawful money of the United States, which said goods and chattels were then and there a part of an interstate shipment of freight over the lines of railroad of the said Southern Pacific Company, and were then and there in transportation over said lines of railroad from John Bollman & Company of San Francisco, California, to Coast Cigar Company, Lang & Company, Hart Cigar Company, and T. W. Jenkins, all of Portland, Oregon, in interstate commerce. [4]

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

ANNETTE ABBOTT ADAMS,

United States Attorney.

[Endorsed]: Bond 5,000.00. No. 586. United States District Court, Northern Division, Northern District of California, First Division. The United States vs. Joseph Rosenthal, Morris Rosenthal and Arthur F. Fitch. Indictment for Buying, Receiving and Having in Possession Goods Stolen from Interstate Shipment of Freight. A True Bill. W. E. J. Baughman, Foreman Grand Jury. Presented in Open Court and Ordered Filed Apr. 28, 1920. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. Annette Abbott Adams, U. S. Attorney.

May 5, 1920. Each Deft. arrg., each plead Not Guilty.

Nov. 30, 1920. Trial. Contd. to Dec. 1, 1920.

Dec. 1, 1920. Trial resumed. Jury returned vdict. Not Guilty on both counts as to Defts. Morris Rosenthal and Arthur F. Fitch; not guilty on 1st count and guilty on 2d count as to Deft. Joseph Rosenthal.

Dec. 2, 1920. Deft. Joseph Rosenthal sentenced to be imprisoned period one (1) year and one (1) day U. S. Penitentiary, McNeil Island, State of Washington. [5]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Wednesday, the 5th day of May, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 586.

UNITED STATES OF AMERICA,

vs.

JOSEPH ROSENTHAL, MORRIS ROSEN-
THAL and ARTHUR F. FITCH.

**Minutes of Court—May 5th, 1921—Arraignment and
Plea.**

This cause came on regularly this day for the arraignment of the defendants. Said defendants were present with their counsel. B. F. Geis, Assistant United States Attorney, appeared for the United States. On motion of Mr. Geis and an

order of Court, said defendants were duly arraigned upon the indictment filed herein, stated their true names to be as contained therein, and plead not guilty of the offense in said indictment alleged, which plea the Court ORDERED be and the same is hereby entered. On motion of Mr. Geis, FURTHER ORDERED that this cause be and the same is hereby continued to October 4, 1920, to be set for trial. [6]

In the Northern Division of the United States District Court for the Northern District of California.

No. 586.

THE UNITED STATES OF AMERICA

vs.

JOSEPH ROSENTHAL, MORRIS ROSEN-
THAL and ARTHUR F. FITCH.

Verdict.

We, the Jury, find the defendants at the bar as follows:

On the first count of the indictment:

JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

On the second count of the indictment:

JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

ALCY E. DAVENPORT,

Foreman.

[Endorsed]: Filed at 7:41 o'clock P. M. Dec. 1, 1920. W. B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [7]

At a stated term of the District Court of the United States of America for the Northern District of California, held at the courtroom thereof, in the City of Sacramento, on Thursday, the 2d day of December, in the year of our Lord one thousand nine hundred and twenty. Present: The Honorable EDWARD E. CUSHMAN, District Judge for the Western District of Washington, designated to hold and holding this court.

No. 586.

UNITED STATES OF AMERICA.

vs.

JOSEPH ROSENTHAL.

**Minutes of Court—December 2, 1920—Motion for
New Trial and Pronouncing of Judgment.**

This cause came on regularly this day for entry of judgment against the defendant Joseph Rosenthal. The defendant was present with E. S. Wachhorst and R. Porter Ashe, his attorneys. R. B. McMillan and Wilford H. Tully, Assistant United States Attorneys, appeared for the United States. Defendant Joseph Rosenthal was called for judgment and asked if he had any legal cause to show why judgment should not be pronounced against him upon the second count in the indictment herein.

Mr. Wachhorst on behalf of said defendant made a motion for new trial, which motion the Court ORDERED be and the same is hereby denied. No sufficient cause being shown or appearing to the Court why judgment should not be entered, the Court ORDERED that said defendant Joseph Rosenthal, for the offense of which he stands convicted on the second count of said indictment, be imprisoned for the period of one (1) year and one (1) day in the United States Penitentiary at McNeil Island, State of Washington. Mr. Wachhorst gave notice of appeal, and the Court FURTHER ORDERED that bond of said defendant Joseph Rosenthal pending appeal be and the same is hereby set in the amount of three thousand (\$3,000) dollars. [8]

In the District Court of the United States, for the
Northern District of California.

No. 586.

Acquitted on Indt. for Viol. Act Feb. 13, 1913,
Morris Rosenthal and Arthur F. Fitch, Both
Counts; Joseph Rosenthal, 1st Count.

THE UNITED STATES OF AMERICA.

vs.

JOSEPH ROSENTHAL, MORRIS ROSEN-
THAL and ARTHUR F. FITCH.

Judgment on Verdict of Not Guilty.

This cause came on regularly for trial on the

30th day of November, 1920, R. B. McMillan and Wilford H. Tully, Esquires, Assistant United States Attorneys, appearing on behalf of the United States, and E. S. Wachhorst and R. Porter Ashe, Esquires, as attorneys for defendants.

Thereupon a jury of twelve persons was duly accepted, impaneled, and sworn to try said defendants.

WHEREUPON, after hearing the evidence and the instructions of the Court, arguments being waived, the case was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, where it was stipulated that all were present, and upon being asked if they had agreed upon a verdict, rendered the following written verdict, which was by the Court ordered recorded in the minutes of the Court and which verdict is as follows:

"We, the Jury, find the defendants at the bar as follows:

"On the first count of the indictment:

JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

"On the second count of the indictment:

JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

"ALCY E. DAVENPORT,
Foreman."

IT IS THEREFORE ORDERED AND ADJUDGED:

That the said Morris Rosenthal and Arthur F. Fitch be discharged [9] from custody, and that they go hence without day; and

That the said Joseph Rosenthal be, on the first count of the indictment filed herein, discharged from custody and that on said first count of said indictment he go hence without day.

Judgment entered this 2d day of December, 1920.

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,
Deputy Clerk. [10]

In the Northern Division of the United States District Court for the Northern District of California.

No. 586.

Convicted of Violation Act Feb. 13, 1913.

THE UNITED STATES OF AMERICA

vs.

JOSEPH ROSENTHAL.

Judgment on Verdict of Guilty.

R. B. McMillan and Wilford H. Tully, Assistant United States Attorneys, and the defendant Joseph Rosenthal with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 28th day of April, 1920, charging him with the crime of Violation of the Act of Feb. 13, 1913; of his arraignment and plea of Not Guilty; of his trial and the verdict

of the Jury on the 1st day of December, 1920, to wit:

“We, the Jury, find the defendants at the bar as follows:

“On the first count of the indictment:

“JOSEPH ROSENTHAL not Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“On the second count of the indictment:

“JOSEPH ROSENTHAL is Guilty.

MAURICE ROSENTHAL not Guilty.

ARTHUR F. FITCH not Guilty.

“ALCY E. DAVENPORT,

“Foreman.”

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein on the second count of said indictment, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial, thereupon the Court rendered its judgment:

THAT, WHEREAS, the said Joseph Rosenthal having been duly convicted in this court of the crime of Violation of the Act of Feb. 13, 1913;

IT IS THEREFORE ORDERED AND ADJUDGED that the said Joseph Rosenthal, on the second count of said indictment, be imprisoned [11] for the period of one (1) year and one (1) day in the United States Penitentiary at McNeil Island, State of Washington.

Judgment entered this 2d day of December, A. D. 1920.

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,

Deputy Clerk. [12]

In the District Court of the United States in and for the Northern District of California, Northern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

Assignment of Errors.

And now comes Joseph Rosenthal, the plaintiff in error, and in connection of his petition for a writ of error, says:

That in the record proceedings and judgment aforesaid, error has intervened to his prejudice, to wit:

First: The Court erred in giving and entering judgment against plaintiff in error on the verdict entered herein, because

(a) The second count of said indictment states no offense under the statutes of the United States.

(b) The jury by which said cause was tried found all the defendants charged, not guilty upon the first count of said indictment. It was thereby

determined that plaintiff in error was not guilty of buying or receiving the cigarettes described in said first count, knowing them to have been stolen.

(c) The jury by which the cause was tried found all the defendants charged under the second count of said indictment, not guilty, except the plaintiff in error, who was found guilty. The only evidence presented the said jury on the trial of said cause conclusively shows that plaintiff in error actually bought said cigarettes solely for defendant, [13] Maurice Rosenthal, as his agent and employee; that the same were received by, retained and held in the possession of the said Maurice Rosenthal, and that none of the same were ever received by, or ever had or held in the possession of, the plaintiff in error.

(d) There was no substantial evidence introduced at the trial of said action sufficient to sustain the conviction of plaintiff in error.

(e) There was no evidence introduced on the trial of said action showing, or tending to show, that said plaintiff in error had ever bought, received or had in his possession, any of the cigarettes mentioned and described in said second count of said indictment, knowing the same to have been stolen.

(f) By the verdict of acquittal of each and all of the defendants under the first count of said indictment, said jury determined that none of the several defendants had then and there unlawfully, willfully, knowingly, feloniously or otherwise, bought and received the cigarettes described in said count, knowing the same to have been stolen, and

the same thereby became tantamount to an acquittal of all said defendants on and under said second count of said indictment.

(g) The verdict of the jury is inconsistent in that it found all of the defendants not guilty of buying and receiving certain cigarettes described in the indictment constituting a part of an interstate commerce shipment, knowing the same to have been stolen, and also found under the second count of said indictment that plaintiff in error received and had in his possession the same cigarettes, knowing them to be stolen.

(h) It appears from all the evidence introduced at said trial that the verdict is at least as consistent with [14] the innocence of the accused as with his guilt.

Second. The court *error* in refusing to grant plaintiff in error a new trial because

(a) The second count of said indictment states no offense under the statutes of the United States.

(b) The jury by which said cause was tried found all the defendants charged, not guilty upon the first count of said indictment. It was thereby determined that plaintiff in error was not guilty of buying or receiving the cigarettes described in said first count, knowing them to have been stolen.

(c) The jury by which the cause was tried found all the defendants charged under the second count of said indictment, not guilty, except the plaintiff in error, who was found guilty. The only evidence presented the said jury on the trial of said cause conclusively shows that plaintiff in error actually

bought said cigarettes solely for defendant, Maurice Rosenthal, as his agent and employee; that the same were received by, retained and held in the possession of the said Maurice Rosenthal, and that none of the same were ever received by, or ever had or held in the possession of, the plaintiff in error.

(d) There was no substantial evidence introduced at the trial of said action sufficient to sustain the conviction of plaintiff in error.

(e) There was no evidence introduced on the trial of said action showing, or tending to show, that said plaintiff in error had ever bought, received or had in his possession, any of the cigarettes mentioned and described in said second count of said indictment, knowing the same to have been stolen.

(f) By the verdict of acquittal of each and all of the defendants under the first count of said indictment, said jury determined that none of the several defendants [15] had then and there unlawfully, willfully, knowingly, feloniously or otherwise, bought and received the cigarettes described in said count, knowing the same to have been stolen, and the same thereby became tantamount to an acquittal of all said defendants on and under said second count of said indictment.

(g) The verdict of the jury is inconsistent in that it found all of the defendants not guilty of buying and receiving certain cigarettes described in the indictment constituting a part of an interstate commerce shipment, knowing the same to have been stolen, and also found under the second count of said indictment that plaintiff in error received and had

in his possession the same cigarettes, knowing them to be stolen.

(h) It appears from all the evidence introduced at said trial that the verdict is at least as consistent with the innocence of the accused as with his guilt.

WHEREFORE, said plaintiff in error prays that said judgment of the District Court of the United States may be reversed and held for naught.

JOS. E. BIEN,
JNO. B. CLAYBERG,
Attorney for Petitioner.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16].

In the District Court of the United States in and for
the Northern District of California, Northern
Division.

(No. 586.)

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH ROSENTHAL,
Defendant.

Petition for Writ of Error and Supersedeas.

To the Honorable Judges of the District Court of the
United States, in the *District of Northern Cali-*
fornia, Northern Division.

And now comes Joseph Rosenthal, the defendant
in the above-entitled cause, and feeling himself ag-

grieved by the verdict of the jury and the judgment of the District Court of the United States for the Northern District of California, Northern Division, entered on the second day of December, 1920, hereby petitions for an order allowing him, said defendant, to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit, to the District Court of the United States for the Northern District of California, Northern Division; that said writ of error may be made a supersedeas and that your petitioner be released on bail in an amount to be fixed by the Judge thereof, pending final disposition of said writ of error. The assignment of error is filed with this petition.

JOSEPH ROSENTHAL.

By JNO. B. CLAYBERG,
His Attorney.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

In the District Court of the United States in and for
the Northern District of California, Northern
Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

Order for Issuance of Writ of Error.

Let a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the Northern District of California, Northern Division, as prayed for in the petition of the said Joseph Rosenthal; and that a citation be issued to the defendant in error.

And, it now appearing that a citation has been served in the cause, it is now ordered that the writ of error allowed, as above stated, operate as supersedeas and the defendant be admitted to bail upon furnishing a bond in the penal sum of three thousand dollars, condition according to law to be approved by me.

WM. H. HUNT,
Judge.

[Endorsed]: Filed Jan. 20, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that I, Joseph Rosenthal, of the city and county of San Francisco, State of California, as principal, and Maurice Rosenthal and Moses Hartman, both of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Three Thousand Dollars (\$3,000.) to be paid to the United States of America, to which payment well and truly made, we bind ourselves, our heirs,

executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 21st day of January in the year of our Lord nineteen hundred and twenty-one.

WHEREAS, lately, on the 2d day of December, 1920, at the November Term of the District Court of the United States for the Northern District of California, Northern Division, in a cause pending in said court between the United States of America, Plaintiff, and Joseph Rosenthal, Defendant, a judgment and sentence was rendered against said Joseph Rosenthal and said Joseph Rosenthal obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing the United States of America to be and appear in the said court thirty (30) days from and after the date thereof, which citation has been fully served.

Now, the condition of said obligation is such that if the said Joseph Rosenthal shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit, when said cause is reached for argument or when required by law or rule of said court, and from day to day thereafter in said court, until said cause shall be finally disposed of and shall abide by and obey the judgment and all orders made by the said Court of Appeals in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if

the judgment and sentence against him shall be affirmed, and if he shall appear for trial in the District Court of the United States [19] for the Northern District of California, Northern Division, such day or days as may be appointed for a re-trial by said District Court and abide by and obey all orders of said Court, provided the judgment and sentence against him shall not be reversed by the said United States Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void; otherwise, to remain in full force, virtue and effect.

JOSEPH ROSENTHAL. (Seal)

MAURICE ROSENTHAL. (Seal)

MOSES HARTMAN. (Seal)

Approved by:

WM. H. HUNT,

Judge.

Dated January 21st, 1921.

State of California,

City and County of San Francisco, ss.

MAURICE ROSENTHAL and MOSES HARTMAN, the persons whose names are subscribed as sureties to the above bail bond, being severally sworn, each for himself, says:

That he is one of the sureties named in the above bail bond; that he is a resident and householder within the city and county of San Francisco, and that he is worth the amount specified in said bail bond as the penalty thereof over and above all his just debts

and liabilities exclusive of property exempt from execution.

MAURICE ROSENTHAL.
MOSES HARTMAN.

Subscribed and sworn to before me this 21st day
of January, 1921.

[Seal] LOUISE BEARDEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Jan. 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That we, Joseph Rosenthal, of the city and county of
San Francisco, State of California, as principal and
Maurice Rosenthal and Moses Hartman, both of the
city and county of San Francisco, State of Cali-
fornia, as sureties, are held and firmly bound unto
United States of America in the full and just sum of
Three Hundred (300) Dollars to be paid to the said
United States of America; to which payment, well
and truly to be made, we bind ourselves, our heirs,
executors and administrators, jointly and severally,
by these presents.

Sealed with our seals and dated this 2d day of February in the year of our Lord one thousand nine hundred and twenty-one.

WHEREAS, lately at a District Court of the United States for the Northern Division of the North-

ern District of California in a suit depending in said Court, between the United States of America, as plaintiff and Joseph Rosenthal as defendant, a judgment was rendered against the said Joseph Rosenthal and the said Joseph Rosenthal having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California in said Circuit.

Now, the condition of the above obligation is such, that if the said Joseph Rosenthal shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JOSEPH ROSENTHAL.

MAURICE ROSENTHAL.

MOSES HARTMAN. [21]

State of California,

City and County of San Francisco,—ss.

Maurice Rosenthal and Moses Hartman, the persons whose names are subscribed as sureties to the above bond, being severally sworn, each for himself, says:

That he is one of the sureties named in the above bond; that he is a resident and householder within the city and county of San Francisco, and that he is worth the amount specified in said bond as the penalty thereof over and above all his just debts and

liabilities exclusive of property exempt from execution.

MAURICE ROSENTHAL.
MOSES HARTMAN.

Subscribed and sworn to before me this 2d day of February, 1921.

[Seal]

LOUISE BEARDEN,
Notary Public in and for the City and County of San Francisco, State of California.

Bond approved—Feby. 3, 1921.

WM. H. HUNT,
C. J.

[Endorsed]: Filed Feb. 4, 1921. Walter B. Mal-
ing, Clerk. By Thomas J. Franklin, Deputy Clerk.
[22]

In the District Court of the United States, in and for
the Northern District of California, Northern
District.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

**Stipulation as to Settlement, Allowance and Signing
of Bill of Exceptions.**

It is hereby stipulated between the parties of the
above-entitled action, as follows:

1. That the defendant's bill of exceptions was

presented to the United States Attorney for objections and amendments thereto on January 27th, 1921, within the time allowed by law as extended by orders thereafter duly made by Judge of the United States Court duly qualified.

2. That the same has been carefully examined and considered and that the United States Attorney has no objections to the settlement, allowance and signing of the same, and has no amendments to offer thereto, but is of the opinion that the same is a true, full and correct bill of exceptions in said case in behalf of the defendant. It is hereby this day returned to defendant's attorney for delivery to the clerk to be sent by him to the Judge trying said action for settlement.

3. That the clerk of this court is hereby directed to immediately forward the same together with this stipulation to Honorable Edward E. Cushman, United States District Judge, who tried said action, who is hereby requested to settle, allow and sign the same as defendant's true and correct bill of exceptions herein and return the same to the clerk of said court. The fixing of a date for the settlement of the same is hereby expressly waived.

Dated this 1st day of March, 1921.

FRANK M. SILVA,

U. S. Attorney.

JOS. E. BIEN and

JNO. B. CLAYBERG,

Attorneys for Defendant.

(Attached to engrossed bill of exceptions and filed therewith.) [23]

In the District Court of the United States, in and for
the Northern District of California, Northern
Division.

No. 586.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH ROSENTHAL,

Defendant.

(Engrossed) Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 30th day of November, 1920, being one of the days of the November term of said court, before the Honorable Edward E. Cushman, one of the Judges of said court, and a jury duly impanelled, and that said trial continued from day to day until December 2d, 1920.

R. B. McMillan and Wilford H. Tully appeared as counsel for the Government, and E. S. Wachhorst and R. Porter Ashe, appeared as counsel for the defendant.

The Government, to maintain its cause, offered the following evidence, to wit: [24]

Testimony of W. E. Van Dorn, for the Government.

W. E. VAN DORN, called and sworn as a witness in behalf of the Government, *and* testified in substance as follows:

That he was the manager of the Shipping Department of the John Bollman Company during Novem-

(Testimony of W. E. Van Dorn.)

ber, 1919, and prepared for shipment cigarettes from that firm; that he prepared 42 cases of cigarettes from that firm to a number of consignees in the state of Oregon; that the records of such consignees show that they were P. W. Jenkins, Hart Cigar Company, United States Cigar Company and Lang & Company, all of Portland, Oregon; that said cigarettes were shipped on November 7, 1919, over the Southern Pacific Railway Company; that the John Bollman Company was and is a manufacturer of the brands of cigarettes which were shipped in the above shipment and the shipments were made to jobbers, not retailers; that at the time of the shipment the Chesterfields were of the value of \$7.80 per M, the Fatimas were \$9.80 per M, and the Piedmonts were \$7.50 per M; that the cigarettes were packed in paper containers and some were in fiber containers; that there were 5 M packages of said cigarettes in the small container. They were sent out for the Christmas trade and were wrapped in paper with Christmas designs on them. The date of the revenue stamps thereon was October 19, 1919. After an examination of a certain package witness further testified that these Piedmonts stamps do not show any cancellation; these Fatimas show the date of the cancellation very plainly; when the packages were shipped they were numbered to the firm they were to go to and each shipment shows how many packages there were in the shipment to the various consignees. These numbers were put on the packages by a stencil and have been removed on a good many but there is one carton

(Testimony of W. E. Van Dorn.)

which shows evidence of a number; that he notes an indication of a mark on one of the packages in the character of the stencil with which he put the mark on and it has been scratched out; that the address is usually stamped on the end of each package. "We use a half inch stencil and here is the mark made by that [25] stencil." Witness then identifies the various packages as having been shipped by John Bollman Company; that certain packages contained 5 M others 10 M and a little carton containing 200, and the brands as shipped were Fatima, Chesterfield and Piedmont, all Christmas wrapped; each package was properly stamped and stenciled. "We have never sent any packages outside of San Francisco which were not stamped and stenciled;" that the packages investigated were not in the condition they were when shipped because the are all marred up; stenciling has been scratched up and even the whole top has been torn off over the stamp where the stencil has been put on each of certain boxes; the address has also been torn off.

On cross-examination, witness testified in substance, that he knew the price of cigarettes which prevailed on or about the 1st of November, 1919; that the price of Chesterfields was \$7.80 per M, the Fatimas \$9.80 per M. and the Piedmonts \$7.50 per M; these prices were subject to a discount, how much he could not say. He knows that there was a discount of 10% and 2%, so that the Chesterfields would be sold to the jobbers at \$7.80 less 10 and 2

(Testimony of W. E. Van Dorn.)

On redirect examination, witness testified that the prices quoted are from the manufacturer and given to the jobbers who sell to the retailers; that it is not a retail price.

On recross-examination witness testified in substance, that these prices fluctuated and are now higher than at that time, that the change went into effect October 23d, 1919, but they did not change the price until November 24, 1919.

Testimony of C. H. Davis, for the Government.

C. H. DAVIS, a witness called and sworn in behalf of the Government, testified in substance as follows:

That he is a receiving clerk for the Southern Pacific Company at 3d and Townsend Streets, San Francisco, and was such receiving clerk on or about November 1919; that while so employed he received a shipment of 42 cases of cigarettes mentioned by witness Van Dorn; that he took them in and they were placed [26] in C. E. & I. car 35132; that he sent them and turned the bills over to the loading clerk to put in the car on November 7th, 1919; that the same were received by the Southern Pacific Company then under federal administration; that there were four different shipments; they made inquiries at that time whether or not they were received and we checked the numbers of that car. The loading clerk put them into the car and witness presents the records of the four separate shipments and testifies that such records are made out in triplicate, original and a memorandum of another. The memo-

(Testimony of C. H. Davis.)

randum is kept by the shipper. These cigarettes were all checked in by some official and the initials of the checker is afterwards placed thereon. Whereupon the Government introduced in evidence, Plaintiffs' Exhibit 1 for identification.

Testimony of Harry G. Lawrence, for the Government.

HARRY G. LAWRENCE, a witness called and sworn in behalf of the Government, testified in substance as follows:

That on November, 1919, he was carload check clerk, or loading clerk of the Southern Pacific Company, and that he checked into car C. E. I. 35132 the particular shipment identified here from John Bollman Company to Portland, Oregon, in his capacity as loading clerk; that he had present one of the records there, from which he could tell where it was checked in; that there were two lots of 13 and one lot of 12 and one of four, making a total of 42 packages, all consigned to Portland, Oregon. This car was routed over the Southern Pacific and that company is engaged in interstate commerce, or was at that time. It was then under the government administration.

Testimony of Peter E. Moor, for the Government.

PETER E. MOOR, a witness called and sworn in behalf of the Government, testified in substance as follows:

That he was gang foreman in November, 1919, for

(Testimony of Peter E. Moor.)

the United States Railroad Administration, stationed at Portland, Oregon, and in that capacity did check out C. E. I. #35132; that [27] he had the records with him and they showed a shortage in the car as follows: the bill for the United States Cigar Company originally called for twelve cartons and they received ten, Lang & Company originally called for thirteen packages and we only received one, the Hart Cigar Company called for thirteen cases and received none at all. T. W. Jenkins called for four packages and received none at all; that out of the 42 packages, 39 packages were short; that he checked the car out on November 13, 1919; that the shipment was from California and that he checked the car out at Portland, Oregon.

At the close of this witness' testimony, counsel for the Government offered "These records at this time the waybill record" to which offer counsel for defendant stated that they had no objection. Whereupon the Court announced: "They may be admitted and numbered Exhibit #2 for the prosecution."

Testimony of A. E. Jenkins, for the Government.

A. E. JENKINS, a witness called and sworn in behalf of the Government, testified in subsequence as follows:

That his firm on or about the month of November, 1919, ordered certain cigarettes from John Bollman Company at San Francisco; that they were invoiced for 5,000 Chesterfields in Christmas packages, 1,500 Fatimas in Christmas packages and that the date of

(Testimony of A. E. Jenkins.)

the order was October 30, 1919, that the goods were shipped on November 7th and that the invoice price on these cigarettes was \$7.80 per M on the Chesterfields and \$9.80 per M on the Fatimas; that the discount was 10% and 2% for cash; that his firm did not receive any of these cigarettes but filed a claim for \$167.40, which was paid on March 20, 1920. He believes it was paid by the United States Railroad Administration.

Testimony of E. J. Croomsie, for the Government.

E. J. CROOMSIE, a witness duly called and sworn in behalf of the Government, testified in substance as follows:

That he is Secretary of the Hart Cigar Company, Portland, [28] Oregon; that his firm ordered cigars from John Bollman Company of San Francisco on or about November, 1919 that such order was for 30 M Chesterfields at \$7.80 per M and 30 M Fatimas at \$9.80 per M and 5 M Piedmonts at \$7.50 per M; that all these prices are less 10%, making a total of \$508.95; that the records of the firm do not show the order, but that he had a copy of the original notice from John Bollman Company dated November 7th; that his firm waited until the 6th day of December and then put in their claim for \$508.95 which was paid on May 22d; that he should judge it was paid by the United States Railroad Administration because the claim was paid to it.

On cross-examination witness testified that they took the 10% off these claims but not the 2%; that they were entitled to 2% off for cash.

(Testimony of E. J. Croomsie.)

On redirect examination witness testified in substance that this is the wholesale price from the manufacturers and not the retail price on such cigarettes; that the firm were jobbers.

Whereupon, counsel for the defendants stated: "We have consulted with the District Attorney in regard to stipulating the certain facts that are necessary to place this case before the jury in order to facilitate the trial of this case we have agreed to stipulate to what they indicate at this time in regard to proving the conditions of the freight departments," etc.

COUNSEL FOR THE GOVERNMENT.—"Then it will be stipulated that these particular packages, or these particular 39 packages, were shipped in this car C. E. I. 35132.

COUNSEL FOR THE DEFENDANTS.—"Yes."

COUNSEL FOR THE GOVERNMENT.—"And over the lines of the Southern Pacific Company and in interstate commerce?"

COUNSEL FOR THE DEFENDANTS.—"Yes we will stipulate to that." [29]

COUNSEL FOR THE GOVERNMENT.—"And that the same was stolen, removed from the car?"

COUNSEL FOR DEFENDANTS.—"Yes. If we want the location where they were stolen, will you give the same to me?"

COUNSEL FOR THE GOVERNMENT.—"Yes; they were stolen between Roseville and Gerber."

COUNSEL FOR THE DEFENDANTS.—"Very well we will stipulate to that."

(Testimony of M. H. Young.)

COUNSEL FOR THE GOVERNMENT.—“And that they were stolen on or about November, 1919, or October, 1919,”

COUNSEL FOR THE DEFENDANTS.—“Very well.”

Whereupon the Court announced: “The jury will so understand.”

Testimony of M. H. Young, for the Government.

M. H. YOUNG, a witness called and sworn in behalf of the Government, testified in substance as follows:

That during the year 1919 he was yardmaster for the Southern Pacific Railroad Company and had been employed by that company for seven years; that he was stationed as yardmaster at Roseville, California, during the months of September and October, 1919; that he knows the defendants in this case and first met Mr. Fitch around about September 28, or 29th, 1919, at the Pacific Sales Company on the corner of 6th and L Streets, Sacramento, California, at about six o'clock in the evening; that Mr. and Mrs. Fitch were present; that he went into the side door entrance of the Pacific Sales Company, approached Mr. Fitch, and asked him in regard to cigarettes, if he could use some cigarettes which he had. “He asked me about how many I had and I told him I had about 12 cartons, which is 120 M,” and he said, “Will you come in here tomorrow about nine o'clock and I will find out from the San Francisco office”; witness came back the

(Testimony of M. H. Young.)

next morning about nine o'clock and Fitch told him to bring them in and he would take them at \$5.00 per M; witness had on his old clothes that [30] he had been wearing around *the years* and about three or four days' beard on his face. He was in rough dress just as he came in from the railroad where he had been working, and had on ordinary working clothes. "I saw Mr. Fitch next around about October 15th"; that he delivered the cigarettes that morning; that he got through very close to twelve o'clock; they were delivered to them in an automobile, a touring car; that witness was alone when he made the delivery *for* the cigarettes, but when the cigarettes were taken down in the car and put on the sidewalk, Mr. La Veque was with him; who was at that time a switchman working at Roseville; that the only conversation he had with Fitch at that time was that he asked him if he wanted any record in regard to the cigarettes and he said "No." Mr. Fitch paid me in cash; I believe \$597.00. We had no conversation at the time the cash was paid. Witness understood that Fitch was general manager of the Pacific Sales Company, 6th and L Streets, Sacramento; that he saw both Mr. and Mrs. Fitch around about October 15th and thereupon identified Mr. Fitch, who was in the courtroom during the trial. That at that time Mr. La Veque came in, but witness did not hear the conversation. He asked us if we had any more, and Mr. La Veque told him we had 40 more cartons of cigarettes and asked him if he could take them. He said, "Yes," they could,

(Testimony of M. H. Young.)

at a cheaper price. Witness helped take the cigarettes there in the touring car and a little truck. There were no signs on the truck. "We took there 24 cartons at one trip and 16 at another, making a total of 40. We made two deliveries of about 400,000 cigarettes altogether. It took us about three hours to make these deliveries," and witness had no conversation with Fitch except that "he asked us where we lived. We told him at Gerber," which is about 125 miles from Sacramento. Witness thinks that it was on the first trip that they were asked where they lived. It was on the same day that they made the delivery. [31] The second delivery was made within about three hours, maybe two and a half hours from the first delivery. "Mr. La Veque was with me at the time and he was given the name of Mr. F. W. Burke to Mr. Fitch." Witness went by the name of McAllister. "We were dressed about the same on the second as on the first trip. We had on our old clothes and probably were not shaved clean; old clothes as switchmen are ordinarily dressed. We had on our working clothes. The next time I saw any of the defendants was in the store there later, three or four days later, but had no conversation with them"; he was going around and walked in there, that was all. They made the second payment by a check given to Mr. Burke, whose name was on the check. The check was signed by Maurice Rosenthal, was signed on the bottom of the check; "could not say what bank it

(Testimony of M. H. Young.)

was drawn on, but we were instructed to go to the Farmers & Mechanics' Banking Company, Sacramento, to have it cashed. The check was given to Mr. La Veque, or Mr. Burke. It came after the delivery of the cigarettes. We gave Mr. Fitch a bill of sale at one particular time—the only bill of sale that we ever gave. It was requested by Mr. Fitch after the goods were delivered. He came in there and said, 'The check is here, but I will have to have a bill of sale before I can give you a check.' This was about 10:30 in the morning. Mr. La Veque told him in my presence that the bill of sale was at home," which was in Gerber. "We went up the street, made out a bill of sale, and round about forty-five minutes later we came back with the bill of sale and it was accepted. The bill of sale was dated from Roseville"; witness does not recall what the names were signed to it, but believes the name of one was Wilson; could not say whether or not the name La Veque appeared on that bill, but didn't think it did. As witness remembers, on the face of the bill it was W. McAllister and F. W. Burke to so and so.

"In the course of a week, I should think, I next saw the defendants at 6th and L Streets, at the Pacific Sales Company; [32] saw Mr. Fitch and Mr. Joseph Rosenthal. Was informed by Mr. Fitch that Mr. Rosenthal was coming up to see about the cigarettes and when we saw Mr. Rosenthal he informed us that he wanted to draw up a contract with us." Whereupon witness identified

(Testimony of M. H. Young.)

Joseph Rosenthal, defendant, as being present in court. That he had no conversation with him at all. La Veque had a conversation in witness' presence, but witness heard very few words, as he stepped over to one side of the store and paid no attention to what was going on; did not participate in the conversation at all; that the only time he saw the contract was when he was showing it to Mr. Burke, or Mr. La Veque, in his presence; that witness did not have to sign it; that neither Fitch nor Rosenthal requested him to sign it; that it was not signed in his presence, Mr. Fitch told witness that Rosenthal wanted to see him; that witness saw defendants the next time at various times within two or three days after the contract had been drawn up, which was October 30th or 31st, up until the 10th day of November; that witness means by "seeing them," Mr. and Mrs. Fitch, but not Mr. Joseph Rosenthal; that after the time he saw Mr. Rosenthal with Mr. Fitch they made their deliveries to that place; that witness could not give the dates, "but between November 1st and 10th we delivered to them 124½ packages which would be 1,245,000 cigarettes—124 large cartons of cigarettes and one small one"; had no conversation with Mr. Fitch on these occasions. Delivered Chesterfields, Lucky Strikes, Camels, Piedmonts, a few Omars and Fatimas and a little tobacco at various times; that the Omars, Farimas and Piedmonts were delivered on the morning of November 10th, 11:30 A. M. Mr. Fitch received these cigarettes on that

(Testimony of M. H. Young.)

occasion. There were 30 cartons of cigarettes and \$17.00 worth of tobacco which was of different kinds; "there were some Peerless, some Pieperheidsick and I don't just recall just what other kinds there were. They paid us for these cigarettes, \$4.50 per M and \$17.28 for the tobacco." Witness believes the check was for \$467.28. "For the Fattimas they paid us \$5.00 per M and for [33] those they bought under the contract \$4.50 per M; that witness could not say about the condition of those 39 packages delivered on November 10th, 1919, but the most of them were Christmas cigarettes; there were markings there indicating the consignee, but they were not on there at the time they were delivered. "We took the names and pulled them off, but there were markings there showing the paper was scratched up." Witness identified the cartons of cigarettes and testified that they were in the boxes which they delivered to them and identified the same by the place they had taken the names off of the boxes where they were consigned to; that they were in that condition when they were delivered to Mr. Fitch. With reference to the other packages, "they had the name on right here and this is the way it was delivered." Witness could not say whether this box was torn open like this or not, but this is where the name was torn off when the boxes were delivered to the Pacific Sales Company. Indicating another box, witness testified that it was one of the boxes where the name was torn off, stating "around here was this Christ-

(Testimony of M. H. Young.)

mas holly paper and we also tore that off the outside. Here is another one that the name is torn off of. Here is another of them. This is another one, and this is one here." Witness stated that all these were in the condition they were delivered with the names pulled off. Witness continued, stating that they cut off the markings on these packages at Lincoln, Placer County, California, and that at the time they cut off the names and addresses the packages were addressed and consigned to people in Oregon, but witness did not know whereabouts in the State of Oregon, or the names of the people, but remembered that they were going to Oregon. We were paid \$4.50 for the Chesterfields. We were paid \$5.00 per M for the Fatimas on the first time we came there; \$4.50 for the Lucky Strikes. The first lot we took there was Lucky Strikes, and if witness is not mistaken they were paid \$5.00 per M for them and on subsequent sale they were paid \$4.50 per M. Was paid *wither* \$4.50 or \$5.00 for Omars; was paid no sum in excess [34] of \$5.00." Witness further testified that they got these Omars from the Southern Pacific Company out of box-cars at Wheatland; that they did not belong to witness and nobody authorized him to take them out of the car; that they removed them from the side door of the car without permission from anyone to do so. "We got these 39 cases above referred to at Wheatland when we started to leave Wheatland, pulling out of the sidetrack. We got them out of the car then; rolled

(Testimony of M. H. Young.)

them out of the side door. Mr. Burke, or La Veque, was with me. We got these cigarettes on the evening of November 8th, which was Saturday evening, and delivered them on the morning of November 10th, after the execution of the contract above referred to. After they were removed from the car we picked them up and took them up and put them into a touring car and took them to Lincoln, where we waited until morning and took off the names; stayed at Lincoln all night and left there about 9:30 or 10:00 o'clock in the morning. Delivered to the Pacific Sales Company altogether in the neighborhood of 2,500,000 cigarettes between the dates of September 28th and November 10th and were paid close to—pretty close to \$5,500; were not paid for all the cigarettes we delivered; that at the price they offered us there were about \$5,600 yet due.

When we talked to Mr. Fitch he never asked us where we got the cigarettes, nor what our business was, nor did we ever give him any bill of sale except the one above mentioned. We never gave or showed any references and were never asked for them by either Mr. Fitch or Mr. Rosenthal. Never put up a bond of indemnity to guarantee the delivery under the contract, nor was any requested of us. They did not request any banking references or ask us where we banked." Witness believed there were three or four checks given them, all signed by Mr. Maurice Rosenthal. The first payment was given to us in cash; and all the cigarettes

(Testimony of M. H. Young.)

that were delivered were stolen by Mr. La Veque and myself from the Southern Pacific Company.
[35]

On cross-examination witness testified in substance as follows: That his proper name is M. H. Young; that he sometimes went under the name of McAllister. Had never gone under the name of McAllister prior to this time; that he pleaded guilty of the charge against him but had not been sentenced; had never been convicted of a felony previous to this time; that he had been in the employ of the Pacific Railroad Company for seven years at the time he stole the cigarettes, with the occupation of yardmaster; that a portion of the time he was employed by the Southern Pacific Company as clerk, baggageman and warehouseman, but was always in a trusted position; that between the 27th day of September and 10th day of October he had a confidential, trusted position with the railroad company.

That he entered the Pacific Sales Company on or about the 27th day of September about six o'clock in the evening, and first saw Mr. Fitch; he made inquiry when he first went in for the manager; had not known Mr. Fitch prior to this time; had never seen him before; saw Mrs. Fitch there at the time; believed she was present at the conversation witness had with Mr. Fitch. Witness was alone in the store; Mr. Burke or La Veque was outside of the store somewhere. Witness was dressed in his old clothes; that a man around the railroad yards generally

(Testimony of M. H. Young.)

wears his oldest clothes around greasy box-cars; that witness would not be wearing the best he had; he was yardmaster at that time; that in his work he always was out among the men, helping them; he considered that he was worse in appearance at that time than at the present; believed he had on an old blue serge suit, no overalls; believes he had on a cap, but could not say. His name was not asked him, but he made no attempt to conceal his identity; did not disguise himself or do anything to change his appearance; never had in any way disguised himself when he went in there; that his idea of going in there was, "we went to another place in Sacramento about a quarter of 6 and asked them if they could use some cigarettes and they told us 'No.' We went to the Pacific Sales Company. [36] and he said he would take what we had. I made no attempt to conceal my identity at the place we first entered"; that at the time they were directed to the Pacific Sales Company it was very dark and they did not make known to witness that they were under suspicion at all. "We went into the Pacific Sales Company and I said, 'Where is the manager?' but I don't believe he said he was the manager; that in the conversation I think something was said as to whether we were jobbers or manufacturers, and I did not give him a clear understanding. This other man did not give me any reason why he thought the Pacific Sales Company would buy the cigarettes. Could not say why Mr. La Veque did not go inside with me at the time.

(Testimony of M. H. Young.)

We did not select this place as one of any number of places, and there was no concealment. My conversation with Mr. Fitch was in the presence of Mrs. Fitch. My business was mostly done with Mrs. Fitch. I had only one conversation with Mr. Fitch. Mr. Burke completed the transaction and Mr. Fitch directed us to return the next day. We were there between nine and ten in the morning, in the busy part of the morning. There wasn't so very much doing around there. Mr. La Veque did not accompany me at that time. I had a conversation with both Mr. and Mrs. Fitch. Don't recall the amount of cigarettes that I said I had at that time there for sale. Witness was shown a memorandum and stated that he recalled it, but that he don't think it is dated, but don't know; that the word "Sacramento" is in my handwriting and the word "McAllister" looks like my handwriting. I would not deny that it was, but it is not the way I write. I wrote backhand. Have never used the name McAllister before.

Whereupon memorandum referred to was offered and received in evidence marked Defendants' Exhibit "A."

Witness appeared next morning about 9:30 with the cigarettes for delivery; they were outside of Sacramento and were ready to deliver them when the transaction was complete. Mr. and Mrs. Fitch said they would call up the San Francisco [37] office and let us know. There was nothing said to me at that time by either Mr. or Mrs. Fitch about

(Testimony of M. H. Young.)

the title to the goods to my memory. Witness would not say there was not nor would he say there was. If they had said that they did not want to handle those cigarettes if we had no clear title we would have had a bill of sale to show that we had, because I had that made out for them. We were prepared for them. To witness' knowledge there was nothing mentioned in regard to a clear title to the cigarettes. If they had asked for a clear title I would have given it. This is why I am positive they did not ask where I got them, nor where I was from. When delivering these cigarettes the next morning, or after we had delivered them, Fitch stated, "Your check is here, but I will have to have a bill of sale," and he asked us where the bill of sale was. It was in witness' presence and also Mr. La Veque's and we told him Gerber, or at home. Gerber was the name of the place where we were from previous to that time. We went out and came back with a bill of sale drawn up dated at Marysville. We did not state that we had gone to Marysville for it. We gave him that document and that is all that was said. This bill of sale must be in the possession of the Pacific Sales Company. It was presented by witness. About 9:30 o'clock the transaction was completed and the delivery was made after that. Very close to noon; it took us two hours to deliver them. There was no conversation between witness or Mr. and Mrs. Fitch in regard to the whereabouts of these cigarettes. I delivered them in an automobile, my-

(Testimony of M. H. Young.)

self and Mr. La Veque. We drove up to the sidewalk on 6th Street and the delivery entrance of the Pacific Sales Company openly and in the daytime and made no attempt to conceal anything. People were passing back and forth and when the goods were on the sidewalk Mr. Fitch and another man trucked them into the store within the space of five or ten minutes. They were there ready to get them as soon as we took them out of the automobile and they had them in the store in five minutes. Whereupon the following question was asked: "Nobody seemed [38] to be in a hurry, though," to which witness answered, "I know I was not in a hurry."

Q. Either in delivering the goods or in receiving your money?

A. Yes; I was in a hurry to receive the money. Whereupon witness further testifies that he did not make that known to Mr. Fitch; asked him how soon they could have the money and he gave us cash; I believe it was \$597.00; it was in the morning, but not on the same day that the cigarettes were delivered. The transaction was completed by the delivery before the noon hour and I could not say, whether it was the next day or that afternoon that the money was paid us. Fitch had to find out from the San Francisco office. I did not make any demand for my payment; asked him when we could have the money. There was no intimation on our part that we would return for another transaction. Did not intimate to Mr. or Mrs. Fitch that we had

(Testimony of M. H. Young.)

any more cigarettes or would come back. All the people we dealt with at that time were Mr. and Mrs. Fitch. There was no concealment. Everything was done in the open. The first time the price was fixed at \$5.00 between Fitch and ourselves. Would not say whether he made the offer or whether I said we would take \$5.00. I knew the wholesale price of cigarettes at that time; was not familiar with it; did not talk freely or show considerable knowledge of cigarettes and tobaccos at that time; we discussed the values, quantities and prices on that day. I did have considerable knowledge of cigarettes for the reason that my folks are in the tobacco business. I did not hold any lengthy conversation with Mr. Fitch whatsoever. Said nothing about my experience in the tobacco business. I believe I asked Mr. Fitch \$6.00 for the cigarettes and he told me he could not use them at that price, but I could not say whether he did or not. I could not say that he offered me \$4.50; could not say how the price was arrived at, what the cigarettes should be sold for; there was no long drawn out conversation about this price proposition. I could not say whether Mr. Fitch [39] offered me \$5.00 or whether he would split the difference, or whether I said I would bring them in at \$5.00 or not. I knew what they were sold for on account of having them in our store. My people were in the candy business and I knew what they paid for cigarettes at that time. The next transaction was round the middle of October, say between the 1st and the 15th.

(Testimony of M. H. Young.)

The first lot was taken from the car at Roseville. Some of these goods were taken at various places along the route of the Southern Pacific. There was no understanding between us and anybody connected with the Pacific Sales Company that we were to return with more goods. The second transaction was made by Mr. La Veque. I was not in the store when he went in to make the transaction. We walked down; I believe we drove here in the automobile and parked the same at the sidewalk near or right across from the Pacific Sales Company. Mr. La Veque went down there by himself and I sat out there not over a block away; could not explain why I did not go with La Veque; did not think I ought to go back and try the same thing over again. La Veque was roughly dressed at that time in his working clothes. I could not say exactly how he was dressed, but know he did not have on his Sunday suit. Wore overalls on several occasions. Could not say whether he did at this time or not. I was not in store at the time; the only part I took was that I helped to deliver the cigarettes. Don't know the conversation between La Veque or anybody in there, nor who he talked with. We delivered about 40 packages. Mr. Burke, or La Veque, received the money. I was not present when it was delivered. But the proceeds of the first transaction was paid in cash, and the second transaction was by check, I believe, for \$1,080.00.

Whereupon the following question was propounded to the witness: "At that time was there

(Testimony of M. H. Young.)

anything done at all to inform the Pacific Sales Company that you were interested in that—was anything done by any person to show that you were interested in the same?

A. I know I was interested; I was getting the money. [40]

Q. “Was there any conversation, or did you speak about it? A. We never.”

Q. “Did you talk with anybody so that they knew you were interested in that conversation?”

A. “Well, I talked with Mr. Fitch in regard to where we had lived, etc.”

Q. “At this time?”

A. “Yes, sir, on the delivery, not on the—don’t misunderstand me that I was in there making arrangements for the sale, but on the delivery of the cigarettes.”

WITNESS—(Continued.) Mr. Fitch recognized me at that time; spoke to me; could not say whether he called my name or not. He had it down McAlister. Mr. Burke received the check, cashed it and the money was divided between us. To my best recollection on the corner of 6th & K or 6th and J streets. We got paid for I think 24 cartons and just a few days later there were 16 more. I took no part in any transaction between Burke and the Pacific Sales company at that time. The next transaction was a check calling for the amount of \$2,565, I believe, and I could not say as to the exact date; I believe there were 57 cartons in all.

Whereupon counsel for the defendant offered the

(Testimony of M. H. Young.)

check for \$2,565 in evidence. The same was admitted without objection and marked Defendants' Exhibit "D."

The next transaction was where we received a check for \$2,565.00. Witness was shown the check for \$922.50 and testified that he believed that was not for 16 or 18 cartons, which, "I know were delivered very close together. It seems to me that the other check called for cash, something like \$720, but these two checks came in together, are very close. I don't know whether there was a difference between the amount claimed and the amount of the check, but we were paid something like \$100, because Mr. La Veque handled them. He showed me all the checks. In the next [41] transaction I believe the check amounted to something like \$2,505. It was received by Mr. La Veque and he exhibited it to me. Witness here identifies the check. The next transaction I think was November 10th for \$467.20. Witness identifies check which was admitted in evidence. The third transaction was made entirely by Mr. La Veque and outside of my presence. I do not know what the arrangements were or what the transactions were; no questions were asked me. The only person I recall having asked for on the first transaction was Mr. Fitch or Mr. Jos Rosenthal. I had seen Mr. Joe Rosenthal in the morning at the hour of 8:30 or maybe 9 o'clock and he informed me that Mr. LaVeque wanted to draw up a contract. I was not present at the conversation between Rosenthal and Burke. After Mr. La Veque,

(Testimony of M. H. Young.)

alias Mr. Burke, made his arrangements, or completed his transaction with the Pacific Sales people, I was not present at all but was present when the contract was read over. We were standing by a pile of cloaks when it was read over. When it came to signing I walked out. I don't know whether I had been introduced to Mr. Joe Rosenthal or not; I had no conversation with him whatever. He did not refer to me in any way, nor ask any questions. Don't know whether he knew that I was interested but I suppose that Mr. Fitch had told him I was the man that brought them in there the first time. Could not say how the contract was prepared; simply heard them read the contract over. Whereupon the following questions were propounded to witness:

Q. "In all the conversations that you know of between yourself and Mr. Burke, *alias* La Veque and the Pacific Sales Company, was there any attempt on the part of any person to conceal anything?"

A. "Well there was an attempt on our part to get in early in the morning; we would drive up about 7:30 and wait until the opening time of the store."
[42]

WITNESS.—(Continued.) We brought up to the side door on 6th street; we would get in at 7:15 in the morning and then wait until the store opened up, about eight o'clock. We would go up to town in the meantime.

Witness was asked the following questions:

(Testimony of M. H. Young.)

Q. "There was no attempt on your part to conceal anything when you got into the store?

A. Everything was covered up by blankets so that there would be no detection whatever.

Q. What I want to get at is this. Did you make any attempt to make any concealment or convey openness when you got into the Pacific Sales Company store.

A. As much as we could.

Q. In what manner? Did you drive in in broad daylight and park on L Street or on 6th Street?

A. Yes, at the side door."

WITNESS.—(Continued.) One or two precious deliveries had been made at these doors. Mr. Fitch told us once, "You can go to the back hall and make the deliveries there." Do not know who trucked it in. Could not say that was the only reason why we drove to the back door. We did not try to make everything known; we tried to keep things concealed as far as we could. Whereupon the following questions were asked:

"Q. As far as you know, everything was done in the open and in the presence of the people in the store and people passing back and forth on the outside. A. Yes, sir.

Q. You did not at any time tell Mr. Fitch or Mrs. Fitch or any other person connected with the Pacific Sales Company that you were in a hurry to receive your money or that you wanted it right away? A. No, sir."

WITNESS.—(Continued.) I could not say whether

(Testimony of M. H. Young.)

I became acquainted with Mr. Joseph Rosenthal or not. It was on this one [43] day that I saw him on two or three different occasions on that day. I had no conversation with him. Whereupon witness identified the contract and further identified that it had been drawn up in three copies, one to Mr. Fitch, one forwarded to San Francisco and one given to Mr. Burke. He subsequently lost his copy. Whereupon the contract was offered and received in evidence and marked Defendants' Exhibit "F." I did not know Mr. Maurice Rosenthal until this morning, when he came into court. I had never seen him before and never had any business transactions with him. As to the condition the cases of merchandise delivered were in, would say the boxes were broken, some of them, and we had some worse than those I see here, where the packages inside had been disturbed and from what I know, some of them were torn. Could not say whether credit was allowed for that condition. One amount that we suppose amounted to twelve cartons, they would come to \$600, we were paid \$597.00, a discount of \$3.00, and I believe there were two or three little cartons. All of these were there. Numerous packages were badly damaged where they were rolled out of the car and hit the gravel.

On re-examination witness testified as follows: I happened to be in the office of the Pacific Sales Company the day upon which Jos. Rosenthal was in Sacramento; I came there in the presence of Mr. La Veque; I was interested in it the same as

(Testimony of M. H. Young.)

he was. I believe that the only conversation I had on that day with Mr. Fitch was that the son was in to see about how many cigarettes we had and had no prior conversation with Fitch about being there on that day to my knowledge. He told me the day before when Joe Rosenthal would be there. I don't remember whether he told me, or Mr. La Veque, but I know he said to come right there in the morning and he would be there about 8:00 or 8:30. [44]

Testimony of F. W. La Veque, for the Government.

F. W. LA VEQUE, a witness, was called and sworn in behalf of the Government and testified in substance as follows:

That his occupation in November, 1919, or during the year 1919, was a switchman at Roseville, Montana; that he worked with the witness who was just called to the stand, M. H. Young; that he first met any of the defendants the latter part of September; that he first met Mr. Fitch at 6th and L Streets; that he went in there to see if he would buy some cigarettes. I had a conversation with him. He told me he could, if the price was right, and asked me what I expected for them. I told him I believed about \$6.00 I thought was right. Anyway, he talked me down to \$4.50 per M, and I consented and let him have them for that. He asked me what kinds of cigarettes they were and I told him I had Lucky Strikes, some Camels and Chesterfields. He asked me when we could deliver them and I told

(Testimony of F. W. La Veque.)

him the next day or right in the near future, and he said all right, if we would bring them down he would receive them. He had to communicate with San Francisco, I believe Mr. Rosenthal, in regard to the payments of them. That took perhaps two or three days before we got our money. I was alone in there when I had the first conversation with him relative to the sale of the cigarettes. At the time of their delivery Mr. Young was present. He did not talk to Mr. Young more than when we were handling the cigarettes he spoke to him. As a rule I wore a pair of gray corduroy pants, sometimes a blue coat, soft shirt and collar, sometimes had a hat and sometimes I had a cap, sometimes I had on overalls over my corduroy pants. In my duties as a switchman I had to handle the freight-cars that came into the yard; at Roseville we make them up into trains going in three or four different directions and we place them on the proper tracks. I had on my usual working clothes. It was between 3, 4 or 5 o'clock when I first went into the store of the Pacific Sales Company. We delivered the cigarettes in a day or so from that time and of course I saw Mr. Fitch and a few days after that I saw Mr. Joseph Rosenthal. [45] I took the check to the Farmers & Mechanics' Bank and had it cashed. The bank did not cash it without identification. I took it to the Pacific Sales Company and Mr. Fitch O.K.'d the check and then I went back and cashed it. They did not know me at the bank and Mr. Fitch did not ask who I was. He asked me where

(Testimony of F. W. La Veque.)

I lived and I told him Gerber. He asked me if I was in business and I told him "No." I believe it was on that occasion that we gave him the bill of sale, but this bill was demanded after the check had come from San Francisco and we went in for the check. He says, "Your check is here, but we will have to have a bill of sale," and he says, "Have you got it here?" and I says, "I have got it at home. I left it in my other coat." I had told him that I lived at Gerber at that time. We went out and returned in about thirty or forty minutes with the bill of sale and we gave it to them. The amount covered more than the amount we had and I presented it to Fitch and he gave me the check. The bill of sale was made out on a piece of plain paper with pen and ink. Mr. Young, the witness who just testified here, wrote it. I don't know the exact time I saw any of the defendants next, but right around there very closely I saw Mr. Fitch. On one of the occasions he told me that Mr. Joseph Rosenthal was coming up from San Francisco and he wanted to see me in regard to these cigarettes, about how many we had. Whereupon witness identified Mr. Joseph Rosenthal as being present in court, as well as Mr. Fitch.

WITNESS.—(Continued.) Maurice Rosenthal's name was signed to the check. I saw Joseph Rosenthal that evening. Fitch introduced him to me and he asked me how many cigarettes I had and we told him between two and three millions. This was in the morning that I was there, between 8

(Testimony of F. W. La Veque.)

and 8:30 and he was not there then. I came back a little later, I should judge between 8 and 10 o'clock, and he was there. I believe Mr. Young was with him. Rosenthal asked me how many I had and I told him between two and three millions. He then said he was going to draw up a contract to that effect and that night I received the same and signed it. [46] I did not dictate any of the terms of that contract. It was drawn up when I first saw it. It was not drawn in my presence and he did not ask me whether I had any more then; Mr. Fitch and Mrs. Fitch and myself signed the contract and I believe Mr. Joe Rosenthal did also. Whereupon witness identified the contract as the one furnished by Mr. Joe Rosenthal, which is in the words and figures following:

“Sacramento, California, October 31st, 1919.

I, F. W. Burke, residing at Gerber, California, citizen of California, United States of America, agree to sell to the Pacific Sales Co., located at 6th & L Streets, Sacramento, Calif. Two and one half million (2,500,000) or over cigarettes, composed of the following brands: Camels, Lucky Strikes or Chesterfields. The price of the same to be Four fifty (\$4.50) per thousand. Delivery on same to be one-third on November 1st, 1919, and the balance within fifteen (15) days. Terms and payment on same to be as follows: One third payable December the 1st, 1919, one third payable December 15th, 1919, one third payable January 1, 1920.

The seller, F. W. Burke, guarantees the cigarettes

(Testimony of F. W. La Veque.)

to be in first class salable condition. He also guarantees that these cigarettes were not obtained in any illegal manner, or in violation of any Federal, State or local law or statutes, and gives to the Pacific Sales Company, a clear bill of sale to same, with each delivery. In the event F. W. Burke having a larger quantity of cigarettes than stated above of the above brands, he agrees to deliver and the Pacific Sales Co. to accept the same on the same basis of Four Fifty (\$4.50) per thousand.

F. W. Burke further agrees to deliver these cigarettes F.O.B. to the Pacific Sales Co. 6th and L St., Sacramento.

(Signed) F. W. BURKE.

I accept the above for the Pacific Sales Co.

(Signed) JOSEPH ROSENTHAL.

Witnesses:

ARTHUR F. FITCH.

ROSE FITCH." [47]

WITNESS.—(Continued.) "This is the contract which I signed and is one of the triplicate copies. The contract heretofore read in evidence was thereupon admitted and marked Plaintiff's Exhibit 3. Joe Rosenthal said he would write up a contract; did not tell him to put in any of the terms. The only terms we had agreed upon, was the price. The contract is signed F. W. Burke, which is the name I was known by and signed to this contract. We did not sell any cigarettes under this contract that we got paid for. We delivered cigarettes under this contract; the first delivery was about 125,000,

(Testimony of F. W. La Veque.)

shortly after it was made and in a very few days. This delivery was made in November. I believe we delivered 127,000, some odd, cigarettes applying on the contract, Camels, Lucky Strikes and Chesterfields, I should judge; they were mixed up, but Camels, Lucky Strikes and perhaps a few Chesterfields. We afterwards delivered some Fatimas, Chesterfields and Piedmonts, and some chewing and smoking tobacco. Our contract did not cover Piedmonts or Omars. We delivered these around the 10th of the month; I believe it was 39,000 packages and some chewing and smoking tobacco. It was not covered by our contract. We went into the store with this particular bunch of cigarettes, these 39,000 packages, and this chewing and smoking tobacco and asked Mr. Fitch if he could get the money for them and he said we could, but he had to write to San Francisco and in a very few days we got the check covering them, I believe \$467 and some odd cents. This check was signed by Maurice Rosenthal. I gave no bill of sale under this contract, but we got one check after we made it out, applying to the cigarettes on the contract. They did not request of me any indemnity bond or guarantee, nor was anybody else signed on our guarantee under the contract. They asked for no references. They did not ask where we banked. He asked me if I was in business at one time, as I told you before. Fitch asked me that and I told him "No." Mr. Joe Rosenthal told me he would take all I had and all I could [48] get at \$4.50

(Testimony of F. W. La Veque.)

per M. He did not ask me if they were stolen. Mr. Rosenthal one day in the store was looking at them and he saw one of these packages, and he said that the name of some steamship company was on it, and he said, "Where did you get them? Were they assigned to a steamship company in Seattle?" as he figured they were perhaps Government cigars. I consider that he did not ask me where I got the cigarettes, because he did not give me a chance to answer and I did not volunteer. He just happened to see something about the steamship company and Seattle and he said he figured they were Government cigarettes. I did not request that the clause, that should I have a larger number of cigarettes I agreed to deliver the same to the Pacific Sales Company at \$4.50 per M. I told him the cigarettes were in Gerber, California and he never asked me how I got them. We delivered over two million cigarettes and have been paid between \$5,000 and \$6,000. To complete the contract they owed us for about 125,000, which would be between \$5,000 and \$6,000. I got these cigarettes that I delivered out of box-cars on the Southern Pacific Railroad. Was not authorized by anyone to take them out of the cars. They were never given to me by anyone and no one sold them to me. The car that was operating at the time I took them was on the Southern Pacific line between Roseville and Gerber and I stole all the cigarettes that I delivered to the Pacific Sales Company. Whereupon witness identified certain packages and further identified that

(Testimony of F. W. La Veque.)

such packages were in substantially the same condition then as when they were delivered. Some of them I think were worse damaged than these are. Some of them were tied together to keep them from falling out; the ends were broken out of them and several of them had been dropped from the automobile. All the consignees' names were cut off the packages. They were all the same class as you see there. Some of them were the large ones and some the small ones. We tore all the marks off; when we brought them to that place the marks were all scratched off. [49] There were several marked Christmas packages.

On cross-examination witness testified in substance as follows:

I was there under the name of La Veque, but was known to the Pacific Sales Company as F. W. Burke. I had never gone to that name previous to these transactions. I came to adopt the name because it was about the first name I could think of, I was not present at the first transaction between Young and the Pacific Sales Company. I was outside the store. A few days later I went into the Pacific Sales Company store myself. Don't remember how many days after that it was. Mr. Young did not tell me at that time of any arrangements he had made with the people in the Pacific Sales Company any more than that I was to proceed with the delivery of the first transaction. There was no concealment tried there at all that I could see. Everything was done in the open and we made no

(Testimony of F. W. La Veque.)

attempt to deceive Mr. Fitch. We drove up to the sidewalk and unloaded the cigarettes right in the open, and people were passing back and forth and we were in plain view of people in the store. Were absolutely in the clear view; I went in the second time. Young told me what name he had used in the first transaction. It was understood between us and also understood what name I should use. There was no attempt to hurry the transaction along in any manner. The second transaction was the one where we took in 400,000 cigarettes of the various brands, some Lucky Strikes, Camels and Chesterfields and they agreed to pay us \$4.50 per M. I had the first transaction with Mr. Fitch. Mrs. Fitch spoke some, but most of the business was done with Mr. Fitch. I signed receipts at the request of Mr. and Mrs. Fitch. The first receipt was handed me, I am pretty sure, by Mr. Fitch. Whereupon witness identified receipt and testified that he signed it, but that he did not know it was written by Mrs. Fitch. Mr. Fitch would talk with Mrs. Fitch about it, but not with me. I remember [50] Mrs. Fitch handing me a letter from Maurice Rosenthal to read and I wrote on the bottom of the letter; I am not sure whether Mr. or Mrs. Fitch requested that. Whereupon the letter was offered in evidence and is as follows:

(Testimony of F. W. La Veque.)

“San Francisco, California, October 1st, 1919.

Mrs. Fitch,

Pacific Sales Co.,

Sacramento, Calif.

Dear Madam:

I am in receipt of yours of September 30th, but before sending you a check for \$1040.00 for those cigarettes which you purchased, we want you to make sure that those cigarettes are not stolen and that the man has a title to those goods, as I do not desire to buy stolen goods, no matter at what profit we can make on same.

If, however, you feel assured that the man has obtained these goods legitimately, telephone us and we will forward check for the money, but if you have any doubt on the subject, let him take his goods back as I do not want to get mixed up with any disreputable proposition.

Yours truly,

MAURICE ROSENTHAL.

P. S.—If the party you purchased these cigarettes from, is willing to sign an affidavit or even this letter that the goods have been purchased by him and that there is nothing owing for the cigarettes, or in other words, if he has a clear title to same, have him sign this letter and return same to us.

I have a clear title to these cigarettes.

(Signed) F. W. BURKE.”

Mr. and Mrs. Fitch asked me for a bill of sale, I think, and I signed that letter that I had a clear title; I did not talk very much at all. All I did was

(Testimony of F. W. La Veque.)

just to sign that letter and that was satisfactory. I indicated to them in no manner that the cigarettes were stolen, nothing that they were stolen. They indicated that they were stolen by the condition [51] of the packages, but I did not tell them they were stolen. We went there openly, but did not talk much. I recall a conversation with either Mr. or Mrs. Fitch in which they said Joe Rosenthal wanted to see me. The conversation I had was with both Mr. and Mrs. Fitch and they told me that Joe Rosenthal was coming up from San Francisco and wanted to see me in regard to these cigarettes. I have a pretty good memory, but do not remember everything. I have forgotten some dates, and perhaps some amounts. What I am telling I am certain of. I always used the name F. W. Burke in signing receipts, or bills of sale, or whatever memorandum was requested of me. I daresay that while I was in the salesroom or office of the Pacific Sales Company I would loiter around considerably or remain in the place for some time, for a half hour or so, and never made any attempt to get in quickly or get out quickly. Went in there many times through the front door and went away through the front door. In response to request of either Mr. or Mrs. Fitch I went back the next day to meet Joe Rosenthal, and I am pretty sure I was told to come back the next day by Mr. Fitch. We had talked with Mrs. Fitch, but not very many times; very little. I talked with Mr. Fitch the most. Everything was put in the terms of the contract now

(Testimony of F. W. La Veque.)

in evidence. All I had to do with it, or did with the contract was to sign it. I never suggested anything in regard to the terms of the contract to Mr. Rosenthal. We went over the terms before the contract was made. Young and I talked that over. Whereupon the following question was asked the witness:

Q. "Did you have a discussion and did not Mr. Young dispute with you in regard to the terms of the contract?"

A. I could not say whether he disputed with me or not.

Q. Do you remember where the contract reads, '30 days or three payments,' didn't Mr. Young insist that you would accept only two payments?"

A. I believe there was something about that, that we [52] should make the payments a little bit closer together."

Whereupon witness continued: This was all the discussion between Mr. Young and myself regarding the terms of the contract. I just read the contract and I remember the evidence pretty well. I signed it. Whereupon the following questions were asked:

Q. "Didn't you discuss the contract between you, and you gave in in regard to those terms?"

A. We asked one thing about the terms, those three payments. He wanted them made in two and I said, 'Let it go,' and he said 'All right.'

Q. You stated 'let it go' and Mr. Young agreed to that? A. Yes, sir."

(Testimony of F. W. La Veque.)

WITNESS.—(Continued.) I took the contract and signed it. Something was said about the business that we were in and one of us got very indignant and said he should not ask such questions from the very fact that we had the goods in such quantities. They never asked us what business we were in. I saw Rosenthal in the morning about 8 o'clock and received the contract about 3 or 4 o'clock in the afternoon, and during that time nothing was said between Young and Rosenthal. Saw the contract first in the afternoon and within a few minutes signed it. Rosenthal just simply made out the contract and I read it over and Young and I discussed the terms that the money was to be paid on and we agreed. In a very few minutes he wanted to know about the delivery of the cigarettes and I think Young went out. Rosenthal suggested the time be given for the delivery of this merchandise or the time of payment. He asked how much time we wanted on that in the morning, then he went out and made the contract. The dates of payment were discussed at the same time when he made out the contract. The first time I ever saw the dates was when he handed me the contract. Whereupon the following questions were asked:

Q. "You were perfectly agreeable to give the Pacific [53] Sales Company all the time they wanted within reason?

A. That was reasonable enough.

Q. Was that for the purpose of misleading them or making them think that you were willing to give

(Testimony of F. W. La Veque.)

them all the time necessary to investigate?

A. No, it was not.

Q. Was it covered by your contract?

A. No, sir.

Q. Why did you give that time?

A. Because they asked for it.

Q. But it was perfectly agreeable to you?

A. It was.

Q. Why didn't you insist upon getting payment immediately?

A. I guess because we did not need the money.

Q. Were you afraid that they might discover these were stolen goods? A. No, sir.

Whereupon witness continued: In response to a question of the district attorney that myself and Mr. Young stole those goods from a car on the Southern Pacific tracks between Gerber and Roseville; we stole them out of that particular car and delivered them in an automobile and truck. I never told Rosenthal or his associates that we had stolen those goods or intimated or informed them that we had. We took every precaution to remove the identity of those goods so that the purchaser would not know where they came from. We removed all identification marks prior to delivery. Every delivery that was made there was made by us in the open in the morning; there was no concealment. Generally delivered them during business hours as soon as the store was open. He told us the money would be there in a day or two and we would drop in to see whether it was there. Most of the payments were

(Testimony of F. W. La Veque.)

received by check, made out in my name and the checks were [54] received from two to three or four days after the transaction. I took the checks as we received them to Mr. Young. I guess they were all right. If you will show me the checks I will show you my signature thereon. We cashed them at the Farmers & Mechanics' Bank. Had no account there. I was introduced to Mr. Richardson, the president of the bank, but made no arrangements to open an account there. There were no other people implicated in this transaction, this stolen goods proposition, besides myself and Mr. Young. He and I carried on the entire transaction. Young made the first bargain with the Pacific Sales Company and I handled all the transactions afterwards. I was introduced to Mr. Joe Rosenthal, at the time of the contract, by Mr. Fitch. Never met Mr. Maurice Rosenthal. Never saw him until today. Never made any transaction with him. The only transaction I ever had with him was the reading of the letter relative to Mrs. Fitch to be very careful about accepting stolen goods and his signature on those checks. I have been in the employ of the Southern Pacific Company since September, 1917, practically two years at the time these goods were stolen. I consider that I occupied a responsible position during this time. My duties were principally a switchman's duties to make up trains and distribute cars to the different parts of the yards. As a rule, I wore corduroy pants and a pair of overalls when the weather was good when I was at

(Testimony of F. W. La Veque.)

work. When the weather was bad we sometimes put on something heavier than that. When I was not engaged immediately in work I had on a hat and clothes like I have on to-day. When I presented myself to the Pacific Sales Company I was in my working clothes. Don't believe I had overalls on when I went there first. Think I wore a cap on the first day. Whereupon witness recognized Mr. Fitch, testifying that he was the gentleman that he had the conversation with. He also recognized Mrs. Fitch and testified that he could not say for sure [55] that he saw Miss Lewis there. She might have been; that he knew there was a lady with black hair behind the counter but he could not exactly identify this woman because he did not fix her face in his memory. She was in the store at the time of the conversation with Joe Rosenthal. Whereupon witness was asked the following questions:

Q. "Mr. La Veque, Mr. Joseph Rosenthal had had a conversation with you in regard to the identity of the goods; don't you recall that where he stated he thought the goods were Government goods because he saw the words 'Pier' and 'Seattle' on them? A. Yes, sir.

Q. And you mislead him and let him believe it?

A. I did not mislead him.

Q. You did not make any explanation at all.

A. He didn't give me a chance.

Q. What was that?

A. He said he thought they were Government

(Testimony of F. W. La Veque.)

goods but it didn't make any difference at this price.

Q. Do you say that he used just those words or what did he say?

A. He used just about those words.

Q. When he told you they were Government goods you let him believe that.

A. He said he thought they were Government goods.

Q. But you let him believe that.

A. I did not stop him; no.

Q. And for a very good reason?

A. I could not very well unless I would come right out and tell him that I stole the goods.

Q. But you let him believe that they were Government goods, and you made no explanation afterwards, did you?

A. I did not say anything afterwards. I was not allowed to explain. He told me he saw on this one package [56] something about the Steamship Company and he said he thought perhaps they were Government cigarettes, "but that don't make any difference as far as we are concerned at the price I am getting them for." Those were his exact words. He let me believe that at the price he was getting them for that he didn't care.

Q. Did you know, as a matter of fact, that Government goods were selling everywhere in the market?

A. It was not Government goods, those cigarettes I had there.

Q. Didn't you know that Government goods were

(Testimony of F. W. La Veque.)

selling, probably Government cigarettes and tobacco, at a lower market value?

A. I did not know.

Q. Didn't you know it at the time?

A. No, sir.

Q. Did you ever have a conversation with Mr. Young regarding those goods, saying they were Government goods?

A. I never knew that the Government was handling cigarettes, selling them.

Q. Didn't you so understand?

A. I didn't at that time.

Q. But you have since?

A. I have heard quite a lot about it.

Q. Did you know that Government goods were being sold under the market value? A. Yes, sir.

Q. You gave that intimation to Mr. Rosenthal and he may have been under the impression in the purchase of those cigarettes.

A. Probably so.

Q. You took any kind of means that you could in the sale of these cigarettes. A. No, sir. [57]

Q. You did try in every manner to keep them from knowing they were stolen.

A. No, he asked me that question. He did not give me time to answer.

Q. You tried in every way in the world to prevent them from knowing they were stolen?

A. I did not, but I naturally didn't want to come right out and tell him they were stolen.

On redirect examination witness testified in sub-

(Testimony of F. W. La Veque.)

stance as follows: Witness was asked the following questions:

Q. "At the foot of this letter, marked P. S., the following language is used, 'If the party you purchased these goods from is willing to sign an affidavit.' Did you offer to sign an affidavit?

A. No, sir.

Q. Did they request you to sign an affidavit?

A. No, sir.

Q. It continues, 'or even this letter that the goods have been purchased by him and there is nothing owing anybody for cigarettes, or in other words, if he has a clear title for the same, have him sign this letter and return to us.' Did you sign this statement? A. Yes, sir.

Q. But they did not request an affidavit?

A. No, sir.

Q. Did they request a statement of you to the effect that there was nothing owing anybody on these cigarettes? A. No, sir; they did not.

Q. Did they ask you to take this letter before a notary public and sign it? A. No, sir.

Q. Did they ask you for any references at that time? A. No, sir; none whatever. [58]

Q. I show you this letter and ask you whether that letter is in the same condition as it was when it was shown to you?

A. I believe it is the very same letter."

Whereupon witness continued, saying that the name Maurice Rosenthal was not written, but was typewritten and not signed; that they didn't show

(Testimony of F. W. La Veque.)

him the envelope, but just the letter. This letter was shown to me before the contract was signed. Mr. Joe Rosenthal, at the time he had that conversation with me about the package having "Pier, Seattle" marked on it, did not ask me at that time whether any of the goods were stolen. He never asked me, but once he told me that it did not seem possible that the goods were stolen, owing to the amount we had. Mr. Fitch never asked me, nor Mrs. Fitch. I believe Mrs. Fitch gave this letter to me the first time. She sent it to San Francisco, or wired, which I do not know, but we got the check in a day or two afterwards. At the time we made these deliveries they did not ask how it happened that those torn places on the side of the packages got there. Never asked us anything about the package, nor called these marks to our attention.

Testimony of Bernard McShane, for the Government.

BERNARD McSHANE, a witness called in behalf of the Government, testified as follows:

That he was, at the time of the trial and had been for about fifteen years, special agent for the Southern Pacific Company; that he was acquainted with the Pacific Sales Company and went to their premises on or about the 14th day of November, 1919, which is located at 6th and L Streets, Sacramento; that he talked to Mr. and Mrs. Fitch subsequent to the arrest of Mr. Young and Mr. La Veque, for the theft of cigarettes from box-cars on the Southern Pacific. At the time of making arrest, the day

(Testimony of Bernard McShane.)

after their arrest which was the 14th, he got a copy of the contract now in evidence here which was found on the [59] streets of Lincoln, in Placer County; saw by the contract that the cigarettes were being delivered to the Pacific Sales Company; that he did not know Mr. La Veque, one of the men who had been arrested, was going by the name of Burke, but he went to the store with Mr. La Veque and in a conversation with Mr. and Mrs. Fitch asked them if they had been purchasing cigarettes from a man by the name of Burke, and they told him they had; that he found some of these cigarettes on the premises, some of these packages here in evidence; found approximately 650,000. I found 29 of the 39 cases involved in this proceeding there on the premises. Goods in the courtroom part of the 29. They are in the same condition as when I found them.

COUNSEL FOR THE GOVERNMENT.—“We offer these in evidence at this time.

COUNSEL FOR THE DEFENDANT.—“No objection.”

The COURT.—Admitted.

WITNESS.—(Continued.) That he told Mr. and Mrs. Fitch that they had been stolen from box-cars and that he would get a truck and haul them away. I did haul them away that day or the next; kept them in the Southern Pacific station. Took photograph or photographs of them, which were accepted in court, whereupon it was stipulated by defendant's attorney that the photographs should be

(Testimony of Bernard McShane.)

admitted. Whereupon the Court said, "They will be admitted."

WITNESS.—(Continued.) That at the time he stated to Mr. and Mrs. Fitch that the cigarettes were stolen they did not demand any proof of that fact nor did they object to the removal of any of them; that witness advised them that the cigarettes had been stolen by these two men who had just testified, Mr. Young and Mr. La Veque, and that we had the men in jail; that he thinks he asked Mr. Fitch to go to the said jail to look at the men, but do not think that [60] he went up there; that he said somebody advised him not to go there, but would not be sure of that, but knows he did not go; that he knows defendant, Maurice Rosenthal; first saw him at his place of business in San Francisco on November 17, 1919. Mr. Maurice Rosenthal, Mr. O'Connell, Chief Special of the Southern Pacific Company, and Mr. Wirtz and myself were present at a conversation held there at the time. Mr. O'Connell and witness went to this place of Mr. Rosenthal's to talk with him about the cigarettes that had been purchased by the Pacific Sales Company here and about the million that had been shipped a few days before to San Francisco from the store here, to find out what became of that million, or pretty near a million. Mr. Rosenthal was not in the office but Mr. Wirtz was and we waited there until Rosenthal came back. Mr. O'Connell asked Mr. Rosenthal what had become of the 50 cases of Lucky Strike cigarettes con-

(Testimony of Bernard McShane.)

taining 10,000 cigarettes which he had received from the store at Sacramento some days previously, and Mr. Rosenthal said he had distributed them among the different stores throughout California and I think instructed the man in the office to call up the different places where the cigarettes were, for we had advised Mr. Rosenthal that we wanted to get them and have them returned to San Francisco. Mr. O'Connell said to Mr. Rosenthal, "Didn't you think there was something wrong with these cigarettes," or some words to that effect, "on account of your getting them at that price," or "Isn't that an unusually cheap price for cigarettes," but Mr. Rosenthal stated that he had thought there was something wrong with the cigarettes and had sent his son Joseph Rosenthal to Sacramento to conduct an investigation for the purpose of determining whether or not the cigarettes were all right. That his son found, or believed, they were all right and had entered into a contract with Mr. F. W. Burke and I believe produced a copy of the contract and showed it to us. Mr. Rosenthal asked me who Burke was and I told him Mr. F. W. La Veque, that Burke was an assumed name. He [61] asked me if he had any property and I told him I thought the other man, Mr. Young, had a house at Roseville.

On cross-examination witness testified in substance as follows:

I asked Mr. Fitch to furnish me a list of the different lots they had purchased from these men.

(Testimony of Bernard McShane.)

I asked first when these lots were purchased.

Whereupon counsel for the defendant asked the following questions:

Q. "Did they do everything in their power to aid you to restore these goods? A. No, sir.

Q. In what way?

A. Mr. Fitch told me that the first cigarettes he bought was on September 30th. I think he did assist me, but I found on examination of the arrested men that there were cigarettes sold half a month before that time. Mr. Fitch furnished the list in his own handwriting and he is in a position to know everything there. It may be in the writing of Mrs. Fitch but he gave a list of cigarettes purchased to us and they told me that they had purchased 4,143,000.

Q. In what manner, shape or form, Mr. McShane, has any person connected with the Pacific Sales Company deceived you?

A. The letter that was introduced here a while ago shows that. The letter read in evidence.

Q. What did they do to aid and assist you to recover the goods?

A. Nothing, only he didn't tell me about those goods at all." That they did not get back all of the goods from the Pacific Sales Company gotten from the thieves; they had sold some two million cigarettes which we did not get back. They furnished me a list of them, of cigarettes sold from September 30th until the day these men were apprehended. Whereupon the following questions were asked:

(Testimony of Bernard McShane.)

Q. Have they withheld anything from you?

A. I think they have. [62]

Q. Do you know so? A. I do not."

WITNESS.—(Continued.) That he had no feeling against the Rosenthals or against Mr. and Mrs. Fitch; that he does not recollect that he told Mr. Maurice Rosenthal in San Francisco that he excluded him and his firm from any blame in the matter. I did not think so at the time. I did not ever hold Mr. Rosenthal blameless. I did not tell him that I thought he was not responsible for the transaction. Mr. O'Connell asked Mr. Rosenthal the question as to what became of the cigarettes that he had received on November 4th and 10th; then Mr. Rosenthal said he had shipped some to Vallejo and some different places among the stores in different towns, some to Oakland, some to Fresno and some to San Francisco, and Mr. O'Connell said, "Isn't the price that these cigarettes were purchased for by your firm unusually low?" to which Mr. Rosenthal said "Yes," that he thought there was something wrong with the cigarettes or something crooked about the deal because he sent his son Joseph Rosenthal to Sacramento to investigate the matter and that he, Joe, had gone there and investigated the matter. That this had resulted in the contract. I believe he showed Mr. O'Connell and myself the contract and I think he also showed us that letter which you read to the jury. I could not say that I recollect any conversation with Mr. Rosenthal in which I said that I would help Mr. Rosenthal to get back part of the money that he lost

(Testimony of Bernard McShane.)

I will say that no such conversation ever happened. Mr. Rosenthal did ask me in the presence of Mr. O'Connell who those fellows were and I told him they were railroad men, one was a switchman and the other a night yardmaster. Then he said, "What property has Burke got?" and I said, "I don't think Burke has any property, but the other man, Young, has got some property." I went to the Pacific Sales Company at Sacramento in regard to these goods and got from them all the goods they had from those shipments and gave them a receipt. Mr. and Mrs. Fitch, or Miss [63] Lewis, or any personal connected with the Pacific Sales Company did not interfere with me in any way in taking the goods from the store. They showed me where the cigarettes were and I told them I would get a truck and take the cigarettes and they told me to "go to it." They gave me all the information that I asked for. They showed me some records that told me the amount of cigarettes they had purchased. They furnished me a list of the different purchases that had been made from these two men but I don't know whether it was a complete list or not, that he has not yet checked up the list of those lost from the car. I have not any record or memorandum of the goods stolen by these two thieves Young and La Vegue, and we have not received all the goods stolen from the Pacific Sales Company. Our Claim Department in San Francisco has this list. I know that in October there were lots of times that cigarettes had been taken out of the cars and when I found

(Testimony of Bernard McShane.)

the contract I went to see Mr. and Mrs. Fitch and they furnished me with a list of the cigarettes they had purchased. I knew there had been stealing for a month, or pretty near a month, or so prior to their apprehension. This is all I know about it. Where-upon witness identifies the list deliverery by Mr. and Mrs. Fitch, which is dated September 30th, and was offered and received in evidence without objection.

Witness further states that he recovered cigarettes other than these here in evidence that he recovered 76 cases in Sacramento and either 48 or 50 cases recovered that we collected and that were in San Francisco at the time we recovered them. Some of them were forwarded to the consignees and others sold as salvage by the railroad administration. The 29 cases in evidence here are recorded on the lists which were furnished the witness by the Pacific Sales Company. The total number of cigarettes shown on that list to have been delivered to the Pacific Sales Company, say 1,443,500, I recovered from the [64] Pacific Sales Company 1,615,000 and 2,528,500 were not recovered.

Testimony of Dan O'Connell, for the Government.

DAN O'CONNELL, a witness, called for the Government and duly sworn, testified in substance as follows:

That he was the Chief Special Agent of the Southern Pacific Railroad Comany for about two years; that he had a conversation with Mr. Maurice Rosenthal, November 17, 1919, at 49 Battery Street, San

(Testimony of Dan O'Connell.)

Francisco and that Mr. McShane, Mr. Rosenthal and himself, and a part of the time Mr. Wirtz, manager of the store, were present. Witness then identifies Mr. Maurice Rosenthal as being present in court and continues that this is the same conversation testified to by Mr. McShane, that witness made a note of the conversation immediately after he left 49 Battery Street and got to 65 Market Street, a distance of about two blocks and reduced it in writing and has it with him; that the facts were fresh in his recollection at the time he made the memorandum. Memorandum is a statement of the substance of the conversation between Mr. Rosenthal, McShane, himself and Manager Wirtz. Whereupon witness read memorandum to refresh his memory and stated that it refreshed his memory to some extent. At that conversation he stated to Mr. Rosenthal that he had come there for the purpose of recovering some of the cigarettes that were *stollen* and referred particularly to 50 cases that he wanted them returned. After he had explained that he wanted them returned, that they had been stolen and that they had the men in jail he gave Mr. Rosenthal the names of the men that were in jail producing a contract showing that they had purchased cigarettes under the contract for \$4.50 per thousand. I asked him if he thought that price was not below the market value and he said yes it was below the market value and in view of the fact that he had sent his son Joe Rosenthal to Sacramento to make an investigation of the man or men from whom they had purchased the cigarettes. That his son had

(Testimony of Dan O'Connell.)

gone there and came back with the contract. Witness asked [65] him if he thought there wasn't something crooked about the transaction and he said that was the reason for sending his son to make the investigation. I asked him to what extent the investigation was carried, as I recall that he said the investigation was that his son interviewed this man Burke. He showed me some cancelled checks and I was also shown a slip of paper upon which appeared the amounts of four checks which had been paid for by the purchase of the cigarettes to this man Burke. He also showed me that letter which was presented in court yesterday, written to Mrs. Fitch in Sacramento, instructing her or advising her under date of October 1st to be careful about the purchase of cigarettes. In substance this is about what we talked. He stated he had made one purchase before the contract was drawn up.

Whereupon witness identified contract, which is already set out in this bill of exceptions as Defendant's Exhibit "F." He was also shown the letter heretofore appearing in this bill of exceptions marked Defendant's Exhibit "G." He identified the same.

Upon cross-examination witness testified as follows:

That he met Mr. Rosenthal at the store at 49 Battery Street in San Francisco. His conversation did not indicate that he had been already informed that the thieves had been arrested in the cigarette matter, nor did his conversation indicate that he had

(Testimony of Dan O'Connell.)

known of it. I don't think he was surprised when he saw me as an officer of the Southern Pacific in his office. I came in as a gentleman and handed him my card. I came in as a gentleman and met a gentleman. I cannot say that Mr. Rosenthal did, however, give us any assistance. He did not show us his records and did not answer our questions directly. He said that he made only one purchase prior to the contract being entered into which was October 31st and the record that he presented showed on its face that he had made two purchases at least because the checks which he presented showed the dates October 8 and October 30th. He gave us the record for examination but I [66] do not know that it contained all the transaction. I did not say to Mr. Rosenthal at that time that he had withheld memoranda or certain information nor make any remark of that kind. Subsequent to that time I asked information that I wanted; I asked him for an explanation. At that time he showed me one check. Witness identifies check #1313 for \$1040.00. That he read the memorandum over as late as last night and does not see how he should feel otherwise than friendly to Mr. Rosenthal. Our conversation was a friendly one. After the situation was explained to Mr. Rosenthal he made particular reference to one check, this one for \$2565.00 that had been sent to Sacramento on November 3d. He wanted to know if we thought the check had been cashed by the thieves or if the thieves had gotten the check and cashed it and I suggested to Mr. Rosenthal that he telephone to the store in Sac-

(Testimony of Dan O'Connell.)

ramento to see if the check had been delivered or to interview the thieves about it. I know personally of no conversation that I had with Mr. Rosenthal in regard to any property that either Young or LaVeque might have at Roseville. Mr. McShane and Mr. Rosenthal, I believe, talked it over because McShane had come to Sacramento and he was discussing that with him, but it appeared that the \$2500 was lost as we discovered that the man had cashed it while we were in the store. It was discussed whether Mr. Young and La Veque had any property and I believe McShane did say that one of the defendants had a house in Roseville. Mr. McShane was positively friendly with Mr. Rosenthal on that occasion. Everything was friendly at that time. I believe Mr. Rosenthal left his office to go into the other portions of the building with me and McShane and he pointed out to us the goods that were there at that time. I believe that these 50 cases of cigarettes had come in some days previously and were there on the sidewalk in front of his place of business at 49 Battery Street and that they were redistributed out to the different stores that he had in San Francisco, Oakland, Fresno, Vasalia, Bakersfield and Vallejo, [67] and we had the understanding that the whole of the cigarettes, those 50 cases, had been shipped out. I don't recall that we saw any of the cigarettes in his store at that time. We recovered the 50 cases that he had just received but they were by no means all the cigarettes that had been stolen.

Testimony of C. B. Leavitt, for the Government.

C. B. LEAVITT a witness duly called in behalf of the Government and duly sworn, testified in substance as follows:

That he was at the present time engaged in the prune business but in November 1919, he was Assistant Special Agent on the Sacramento Division of the Southern Pacific Railroad; that he accompanied Mr. McShane to the Sacramento store of the Pacific Sales Company at the time he got those cigarettes. Mr. McShane and I went into the store and inquired for the manager and were shown to Mr. Fitch and I also believe we talked with his wife, Mrs. Fitch. At the time we talked to the two of them we asked them if they had bought any quantity of cigarettes from outsiders, that is, anybody but the regular distributors or dealers and they told us that they had. I believe we asked them if they had any contract with anybody for the purchase of cigarettes and we produced a copy of the contract with Burke and they told us they had bought at several different occasions cigarettes from a man by the name of Burke and another man with him. We discussed them for some time and they showed us quite a number of cigarettes they had there. We had them removed the next day. Witness then identified some of the cigarettes in the courtroom which they had removed and continued, that he could not say that the cigarettes were all here in Sacramento at the time he left. Mr. and Mrs. Fitch asked for no proof that the cigarettes had been stolen and they surrendered them to us. We told them

(Testimony of C. B. Leavitt.)

that the two men that stole them had been arrested and were in jail and the cigarettes had been stolen from the Southern Pacific Railroad Company and we wanted them back. I [68] sent a truck down there and we got them with their permission. They told us to go ahead and take them.

On cross-examination witness testified in substance as follows: That he don't know whether the next day was Sunday and they did not get the goods until Monday, but that he does not think the next day was Sunday.

Whereupon the Government rested.

Whereupon the attorneys for the defendant opened their case by calling and having sworn in their behalf, witness HENRY MITAU, who testified in substance as follows:

Testimony of Henry Mitau, for Defendant.

That he resides in Sacramento, is a merchant of Mibus & Shirley Company, large wholesalers of groceries and tobacco; that he knows the price of tobacco and what tobacco is worth and did know the same during the months of September, October and November, 1919; that he knows the Pacific Sales Company, has done business with them, and is friendly to them; that he had occasion to discuss tobacco business with them and they were purchasers of Chesterfields, Piedmonts and Camels there; that he knows who Mrs. Fitch is and that she was the manager for the Rosenthals at the Pacific Sales Company during the months of September October and

(Testimony of Henry Mitau.)

November and until the month of December, 1919. Business was entirely with her and Mr. Fitch had charge of the grocery and tobacco department. The price of \$4.50 per M for Chesterfields Camels and Lucky Strikes during the months of October and first part of November of the year 1919 was not an unreasonable price under the conditions at which grocery jobbers purchased at that time from the Government. I had occasion to look up some of the ordinary purchases I made from the Government. These figures and prices I am informed are absolutely conclusive, and within my knowledge and can be verified by our books and also the Government records. Witness then details what he paid the Government for peas, spinach, prunes and other groceries. [69]

On cross-examination witness testified in substance:

That he bought the peas and spinach in the month of May, 1919, at the Navy Yard at Mare Island, but that he bought no cigarettes or tobacco of any kind. He knows, however, that the Government had large stores of cigarettes and tobacco for sale in the month of May 1920; that there was over in Mare Island Navy Yard a surplus of tobacco of 75,368 packages of Omar cigarettes, 20's, 504 packages of Rex cigarettes, 10s, 4736 tins of Holly Granulated Tobacco, 4896 tins of Lucky Strike smoking tobacco 247, Pride of Reedsville tobacco, 2410 boxes of refined smoking tobacco and six cartons of Peiperheidsick tobacco on that date. Bids were asked by the Government for the above tobaccos through notices published pro-

(Testimony of Henry Mitau.)

miscuously. Could not tell whether I received any notices that there were any *sales tobacco* by the Government in October or November, 1919. We received notices of the sale of foodstuff, including tobacco and cigarettes on exceedingly numerous occasions within the last two years. I should judge weekly, and that comprised such vast stores that it goes beyond the comprehension of any business man unless he should happen to be engaged in handling lots such as they. But I am quite sure that there have been a great number of sales of tobacco and cigarettes during the years of 1919 and 1920, but I don't want to say positively; that he knows of no sale of tobacco made by the Government in the year 1920. As a matter of fact we recently have not paid any attention to any of those sales because they are of too vast a quantity. Never bought any cigarettes from the Government himself, nor tobacco during the months of September, October or November. I know what price approximately was paid for Camels during the month of September, 1919; was \$7.30 less 10 and 2%. Chesterfields during the month of September was \$7.50 less 10 and 2%. I do not know that the wholesale price of Fatimas was during the month of September. The wholesale price of Lucky Strikes during the month of September was \$7.50 less 10 and 2%. Wholesale [70] prices were about the same during the month of October but I believe the price was a little more in November. The wholesale price of Omars, Piedmonts and Fatimas during the months of October and November was not \$9.50 less 10 and 2%. The

(Testimony of Henry Mitau.)

Omars are a better grade of cigarettes than Chesterfields, Lucky Strikes or Camels. I purchased no cigarettes during these months. I bought Chesterfields, Lucky Strikes and Camels during those months at the price stated. I bought no tobacco during any of those months or during any part of the year 1919 from the Government and can say that I know of no one else who did buy during that year.

On redirect examination witness testified in substance as follows: When I spoke of those Government sales of clothing I meant sales at Vancouver Barracks in the state of Washington. Practically all of the Government depots, and the quantities are simply tremendous. For instance, bids were called for from the Mare Island division for Government sale of canned meats and bacon. The bacon is 2,144,692#. The next item is also bacon, 26,000,000# and over.

On recross-examination witness testified in substance as follows: Following questions were asked:

Q. "Will you just come here and examine the condition of those packages. Did you ever see any package in that condition when they were sold by the Government?"

A. I have not seen any cigarettes or tobacco sold by the Government.

WITNESS.—(Continued.) The information I acquired about Government sales was received through notices that were sent to us. Such notices were sent and I took it for granted that such notices were sent to all wholesalers.

Testimony of Mrs. Rose Fitch, for Defendant.

Mrs. ROSE FITCH, a witness called and sworn in behalf of defendant, testified in substance as follows

That she resides in Wheatland [71] where she is in business with her husband; that she resided in Sacramento during the months of September, October and November, 1919; that she was manager of the Pacific Sales Company at Sacramento with her husband; that she knew a man by the name of Burke and also a man by the name of Young, each of whom were on the stand the day before and she recognized them; that she saw them in the office of the Pacific Sales Company in the first part of September, 1919. If witness remembers correctly the two men came in together and they asked for the manager and I suppose one of the clerks pointed me out so I was called somehow. One of them spoke to me about selling tobacco or having some for sale and I sent them to my husband. It was the customary thing for people to come in with goods to sell and as a rule we would send them to Mr. Rosenthal in San Francisco, but these men did not seem to be able to go to San Francisco, so I listened to them and one of them gave me a price which was not worth bothering much about. They asked me \$6.00 per M. I said the price was not worth bothering about because we were only paying \$6.50 and could phone our stores at any time that we wanted them and get them at that price. We ordered every morning tobacco and cigarettes, just going to the phone and ordering. At that time my

(Testimony of Rose Fitch.)

husband was present during the conversation I had with Mr. Young or with Mr. Burke. Those were the names that I knew these men by. I cannot tell who did the most of the talking. We were both together, but I have a great habit of butting in. It was around September 10th when those men came into the office. We had a conversation with them about the same of some cigarettes and tobacco. We did not buy any tobacco at that time because they made the price \$6.00 and I told them we were not looking for a bargain of that kind. They were just ordinary business men like I meet every day. Whereupon the following questions were asked:

Q. How did these men impress you? How did they appear to you—did they appear to you like honest or dishonest men? A. Far from that.

[72]

Q. Give us your ideas.

A. They were just ordinary business men to me.

Q. There was nothing suspicious about their appearance or their manners?

A. Absolutely no."

WITNESS.—(Continued.) The next morning they called again. I remember how they went away, so nicely with smiles, when they were turned down the day before. This Mr. Burke was always a gentleman from the start. They came back the next morning and came in the same way they had gone out of the store. Mr. Young did not come back the next day. Mr. Burke came back and called me and my husband again. We talked it over again, and

(Testimony of Rose Fitch.)

I don't know how, but we got down to \$5.00. I don't know who it was that mentioned the \$5.00, but that was the price agreed upon. Then I called to the phone Mr. Rosenthal, Mr. Burke waiting all the time for the answer there, and Mr. Rosenthal said that if they were all right to go ahead and buy them, when I told him the amount they wanted to sell and the kind of cigarettes. I mean by all right, if they were in good order. He didn't want me to buy anything that was stolen. We told Mr. Burke to bring in the cigarettes, and I don't remember of seeing the cigarettes brought in, but I think they were brought in and stored in the back room. Mr. Rosenthal told me I could pay them out of the cash register. While this conversation was going on Burke said to me and the bookkeeper, Miss Lewis, and my husband, and he seemed so nice and honest all the time. All the time that we were coming to this understanding there were hundreds of customers in the different parts of the store and they paid no attention to Mr. Burke, he looked so honest. I was talking with him and he seemed to me that way, so I guess he took me off my guard. That was the first purchase we made with these men. It must have been two weeks afterwards before we made another purchase. If I remember correctly at the second time these men came in Burke stayed and waited for me. There was absolutely nothing in this that seemed to look anything [73] out of the ordinary. They came in and offered me Lucky Strikes the first time they

(Testimony of Rose Fitch.)

came and these cigarettes are very good cigarettes. If they had come in and offered us only something else that would not have sold so well, that we did not want, I would have turned them down. Then they came in with some Camel cigarettes, and those are very good cigarettes, and I just did not turn them down. We made purchases since that time. I made up my mind that second time that I didn't want what they offered, and didn't give them the price they asked, for the reason they did not get that price was that they offered me some Lucky Strikes, and Lucky Strikes did not have any commercial value to us. This was my second transaction, but after that we had more transactions. I recall when Joseph Rosenthal came up to Sacramento we had a conversation with these men, before that time, and I had that letter that was read in court yesterday from Mr. Rosenthal. This was the third transaction we had with these men. This letter came in, I believe it was the week before Burke came in for his money and I had it on my desk. That was the first time that I was really surprised at Mr. Rosenthal that he should think anything was stolen or anything like that, or dishonest, so I left it there and waited for the men to come in again. They came in from the rear end of the store and the groceteria, and I tried to tell him in a nice way, as I possibly could tell him, why Mr. Rosenthal was suspicious. I talked with him as nice as I could about the letter and took it to him and he looked at it. He always looked to be such a nice,

(Testimony of Rose Fitch.)

straightforward man that I was sure of him. To-day I cannot tell you why I trusted him that way. He was such a gentleman all the time that I really felt sorry, and I knew that Mr. Rosenthal did not know, or else he would not have written in that way. This letter contained a request that I find out if the title to these cigarettes was all right. Mr. Burke, in my presence, wrote the sentence, "I have a clear title to these cigarettes. F. W. Burke." I had all the confidence in the world in Mr. [74] Burke, and never thought of a thing like this because everything seemed so honest and so regular to me. They had sold us cigarettes and had waited almost a week for their money. They were in the store at times. Mr. Joseph Rosenthal came up about the end of every month. He always telephoned to me before leaving San Francisco. He had never seen or heard of them before. He had a talk with Mr. Burke, or with Mr. Young, when he arrived from San Francisco. He and I went to lunch at the Travelers' Hotel and we never mentioned cigarettes, not that I can think of now. Mr. Joe Rosenthal and Mr. Young or Mr. Burke were together, both came in in the morning. They both did the talking. Mr. Young got indignant when Rosenthal said something about wanting to know if they were all O. K. and if it was honest or about a clear bill of sale, etc. Young was the one that got indignant. Mr. Burke never said anything, and was always nice and sat there and listened to the conversation. I heard the conversation between

(Testimony of Rose Fitch.)

Mr. Joe Rosenthal and Mr. Burke. It was also heard by Mr. Young who got very indignant and turned to Miss Lewis and asked if he did not look like an honest man. Mr. Rosenthal spoke about making a contract and he wanted to find out how much they had to sell. On that day, we had just shipped a big lot of these cigarettes to other stores. Then he went ahead and made the terms of the contract and I know that Mr. Young said something about the terms, but I really could not tell you much about it. There was no contract at that time. I heard a conversation between Mr. Young and Mr. Burke and Mr. Joe Rosenthal in regard to the terms and the time. It was going to be delivered in two shipments and going to be paid in three different payments. Mr. Burke or Mr. Young spoke about those shipments and terms. The terms were made up during the conversation while I was there. Mr. Young suggested something and Mr. Burke suggested something and Mr. Rosenthal suggested something. We went to lunch, Joe Rosenthal and I, and while at lunch Mr. Rosenthal put in a call for his father; said he would not [75] make that contract without telling his father, and then after lunch and after the telephone call we went to one side in the hotel and a public stenographer wrote it up while we sat there and waited. She took the dictation right on the machine. Mr. Joe Rosenthal in my presence dictated the contract to the public stenographer. The contract was then taken back to our store in Sacramento where we met only Mr.

(Testimony of Rose Fitch.)

Burke at the time the contract was signed and agreed upon. Whereupon the following question was asked:

Q. "When you had the largest transaction with Mr. Burke, you got a receipt from him?"

A. I always demanded—it did not make any difference who it was—we demanded a receipt and we always got a receipt, too.

Witness then identifies the receipt signed by Mr. Burke which he dated September 7th and signed in my presence. I wrote this part at the bottom and forwarded it to Mr. Maurice Rosenthal. This part that I wrote on the bottom is, "It is all right." I could not tell you how many times I saw Mr. Burke and Mr. Young after that, but we had a number of transactions with them and I was present at all the conversations we had with them. I never even thought of these goods being stolen until Mr. McShane and another man called. I remember it was just after 11 o'clock in the morning, on a Saturday morning. Some of the girls came in at 9, other at 10, and some at 11, because of the eight-hour law, and we kept open store until 10 o'clock at night, so I had a lot to do to place all my girls and get them straightened out. I remember they came in after 11 o'clock, because all the trouble started then, and it was a terrible shock to me. I remember distinctly, as though it was yesterday, that Mr. McShane pulled back his coat, and I remember seeing his star. Naturally, after, he got to talking; I wanted to know how it all came about,

(Testimony of Rose Fitch.)

This was the first time I knew the cigarettes had been stolen. McShane told me that it was stolen property. I could not tell now whether Mr. [76] McShane or the other man. Mr. McShane and his detective told us they were stolen, and how they were stolen and all about it. I was absolutely thunderstruck. Even when they got to talking I could not get it fixed in my mind what they were telling me. But those men said this was stolen goods and I took Mr. McShane back and showed the goods in the back of the store immediately. We even sat in the grocerteria and talked of other things. Mr. McShane asked me if we left the stock lying around in the groceteria, because he said he thought people would steal it. I gave Mr. McShane all the assistance required of me. I know this was on Saturday, and I was very busy, and it was my husband's lunch hour. When he got back, I told him all about it, and even at that time we both of us were very surprised at Burke or that he should have sold us stolen property. McShane and his assistants must have taken the goods out a couple of days later. My husband and I talked it all over, talked about Mr. Burke and wondered why he had treated us like that. I went over to the banker and asked him about this man, and what made it so hard was that they told me that they had different names, that the name of Burke, the one he had given us in store, was not his real name. After I had told the banker about it I then came back to the store and later went down to the station-house where the

(Testimony of Rose Fitch.)

trains come in. I did not see McShane. I went to see the superintendent or something like—I don't know in what office, but anyway they called up Roseville, and that is the first time that Roseville was ever said to me. Whereupon the following question was asked:

Q. "Can you recall from your memory what name the man known as Young gave you on the first transaction?"

A. Always he was "Young" and I always thought of him. I really did not pay any attention to Mr. Young, because he was only supposed to be a friend of Mr. Burke. I never really had any dealings with him.

WITNESS.—(Continued.) I think I never saw the signature [77] of "McAllister." I always got the instructions for the receipts from them, and I never questioned them. I took it for granted and Miss Lewis took it for granted and that is how the receipts were made. I had a conversation with these men wherein they received the check from me and there was a difference to be made up. My husband claimed that Burke had offered us the cigarettes for \$4.50, and I was pretty sure that Burke had said \$5.00, so I wrote to Rosenthal to make the check for \$4.50, and if there was any difference I was to pay it out of the cash, which I did. They came in and we did not question it at all, because Mr. Burke was always so nice about those things. He always wanted to have everything O. K.

Testimony of Arthur Frank Fitch, for Defendant.

ARTHUR FRANK FITCH, a witness called and sworn in behalf of defendant, testified in substance as follows:

That his name is Arthur Frank Fitch; that he resides at Wheatland, and is in business there; resided in Sacramento in September, October and November, 1919; is one of the defendants in the case and the husband of the lady who was just on the stand. In September, October, and November, 1919, I was general manager of the Pacific Sales Company. My wife was the real manager, and I had a department in that store. The Pacific Sales Company is a general merchandise store, owned by Mr. Maurice Rosenthal, who was living in San Francisco at the time. As one of the managers of the Pacific Sales Company, I remember meeting a man by the name of Young, who was on the stand yesterday. This was during the month of September; I met him at the store of the Pacific Sales Company. He came in here with Mr. Burke. I think my wife was there, or I was called up there by her, and they said something about having cigarettes for sale. The man Young made the price, and I naturally took it for granted, by the way they talked, that they were honest and everything was in legitimate order. The terms did not appeal to me to be right, but he had a large quantity to dispose of. I could not see my way [78] to handle the cigarettes for cash for them and the price did not appeal to me, so I told them at that price I could not handle them

(Testimony of Arthur Frank Fitch.)

at all. Mrs. Fitch, who was there, did not know much about the prices of these cigarettes and the first transaction, and we, as employees of the Pacific Sales Company, had nothing to gain and they everything to lose if the deal was not of the highest order. Both my wife and I did the talking and I refused their offer of \$6.00 per M., as I did not consider it anything much and turned it down. They went away and evidently thought better of it and eventually came back the next day, I don't recall now, but I think they said that my price would be accepted. Mrs. Fitch and I said we would have to notify San Francisco, before we could take action on the deal. San Francisco was notified, and they said, "Yes, go ahead." They told us if it was all right to buy the cigarettes. Our instructions came from San Francisco. The following day we were to receive the cigarettes at \$5.00 per M. I do not recall the day upon which the conversation was had, but they delivered the goods on the next day after that, and we paid them the afternoon of the same day. I received the goods myself. At that time I was on the sidewalk and I received the goods on the sidewalk, and trucked them in. There was an order out from the headquarters at San Francisco that managers must receive all goods and see that they are correct. I don't know; anyhow, I suppose they were turned over to one of our men and they trucked them in in the regular way. I checked them off, but I think there was a discrepancy in one of the cartons, where it had been torn open and

(Testimony of Arthur Frank Fitch.)

some of the cigarettes had been removed. I called Mr. Burke's attention to this, and they took them out of the cash. The next transaction was a week or two afterwards, and we bought more cigarettes. It seems that the price was not right, or that there was something about these cigarettes because I talked it over. They were business men the same as you meet every day in business. When they delivered the goods they were dressed in overalls, and I remember distinctly that I thought they were very energetic in delivering their own goods [79] and wanting to get ahead. When these men came in with the goods their appearance and dress struck me as being that of good business men, right from the first to the last. There was nothing in their appearance on the second transaction to form any suspicion in my mind. We had several transactions with these men before Joe Rosenthal came. I made the deals and it was turned over to the office for them to make payments. Whatever I did was to make the deal and to give receipts, to check the goods, and to see that the cigarettes were delivered and taken into the store in the right way. Some of the goods were paid for by check. I think three or four shipments. This happened in line with our policy to pay everything by check. That first transaction, when cash payment was made, I think was an exception. All I know about this thing is I took it for granted, and everything was done in a business-like manner to the best of my knowledge and belief.

(Testimony of Arthur Frank Fitch.)

I never dreamed they were stolen goods, because the men looked honest to me. My wife engaged in all the transactions except the one Mr. Rosenthal had, and only in the interest of the firm. I was present when Joe Rosenthal came in and had a conversation with these men or one of them. Myself, my wife, and, I think, Miss Lewis, was there. They started a conversation in regard to these cigarettes and I figured that this is none of my business, that San Francisco was handling the deal by itself, and I think about that time somebody handed me some papers, and I was called away. I was not present when the terms of the contract were discussed, but I signed the contract as a witness for the Pacific Sales Company. At no time from first to last did anything happen, nor was anything said by these men to create the slightest suspicion in my mind. I was first informed that these goods were stolen when I came back from lunch. I don't know whether my wife told me or Mr. McShane. That was all in his hands and he said they were stolen goods. Mr. McShane was present at the time. Evidently he thought that we knew and that Rosenthal had taken them and knew that they were stolen goods, and they belonged to the railroad company, but I [80] want to say that I never dreamed but what everything was all right or I would have turned them down flat. Mr. McShane said he would send a truck for the goods and I made out a receipt and McShane signed it. The goods were eventually delivered to Mr. McShane. I gave Mr. McShane

(Testimony of Arthur Frank Fitch.)

every assistance that he required at that time, and went with him and we went all over them and made out the receipts. There was nothing concealed from McShane. The price agreed upon on the first lot was \$4.50. On all goods bought after that I believe the contract stipulated was \$4.50. I think that Burke had a few Fatimas, and Piedmonts, and, if I recall right, he did not want to wait for a contract on them as he said he only had a few and would sell those Fatimas along with then cartons of Chesterfields and Camels, but he was to be paid the money for them. I don't remember the price.

On cross-examination witness testified in substance as follows: I was general manager for the Pacific Sales Company and had jurisdiction over groceries and tobacco. I met Mr. Young and Mr. Burke early in September; I believe both of them were together. I don't remember which one I spoke to first when they came in. The first thing was they were inquiring about the prices and I never asked them for any references, because I thought that they had got a shipment of cigarettes and wanted to sell them. They said they had cigarettes for sale, and they mentioned the quantity, and I said, "What is the price?" I don't remember how many cigarettes they stated they had, but I think about twenty cartons, which would be 200,000. To the best of my belief, they both discussed the prices of cigarettes and the terms were made. I cannot tell you what all of our dealings were. Mr. Burke did most of the dealing, and Young was brought along as a

(Testimony of Arthur Frank Fitch.)

friend and assisted him. Burke went ahead and we did practically all of the business with him. Some substance of the business was transacted with the other man, but Burke was the one we looked to. It is impossible for me to remember whom I negotiated with. I have so many goods to handle, [81] and papers to look after, that I cannot remember each transaction. I did not say both of them came back, but the one came back the following day and they agreed to the price I have stated. I would naturally have to ask if they accepted that, and it is my mind that they were agreeable to it and I naturally thought it was all right to go ahead and make the deal. I checked them off as they came in, but the office knows what amount was paid. Whereupon the following question was asked:

Q. "Had you ever in one transaction purchased cigarettes under these circumstances?"

A. I think some from Getz Bros."

WITNESS.—(Continuing.) I bought cigarettes before in Sacramento, not in these quantities; nobody there would have that large quantity, but I would not have to pay that much for them. We bought a large quantity of cigarettes from these men, don't know the amount, whatever the record stated is correct. The firm has all the records as far as I know. Personally I have not. We did not have a bill of sale as each delivery came in. We were receiving goods every day, and required my attention, but I did not worry about bills of sale. I had never met either of the gentlemen before they

(Testimony of Arthur Frank Fitch.)

came into the store. I did not find out where they banked. I asked them for no references, but took it for granted they were business men. Whereupon the following question was asked:

Q. "Did you ask for any guarantee after the contract was executed?"

A. Before that. They turned the goods over to us and gave us an opportunity to make an investigation. I understood it was to be one-third paid before the day of making delivery."

WITNESS.—(Continued.) Probably they could make deliveries the same day. I don't recall. There was a bill of sale put in. I heard that we could not pay for the goods without a bill of sale. I don't know where it is, but when the price was fixed to be paid, that was done in the office and after that I could have no idea. I know a man brought them and when they signed [82] the contract I figured that they were entitled to and I gave them a receipt when he came and got the money. I was in charge of tobaccos in the office, and I bought the cigarettes and didn't want to see the bill of sale. Whereupon the following question was asked:

Q. "Did you buy two or three million cigarettes without seeing any bill or sale?"

A. I don't believe there was a million cigarettes—yes, certainly.

WITNESS.—(Continued.) The man would come in and get the order and that finished the transaction. When they would come in we would have a conversation and they would inquire about cigar-

(Testimony of Arthur Frank Fitch.)

ettes, and we would arrive at the price and I would tell them to send the cigarettes up. I was interested in these men and did not think they were stolen goods, or I would not have entertained the idea of buying them. Whereupon the following question was asked:

Q. "Can you give us anybody else that you bought that number of cigarettes from?"

A. The wholesale houses. I do not know them myself, but in this particular case, this was an exception. If it was not an exception I would not be here now."

I think Mr. Burke signed a bill of sale, because he was the head. No doubt the name McAllister was used. I heard so afterwards. I saw this sidewalk delivery. I examined the packages when they came in only casually. I just looked at them after the receipt, and that looked all right. Furthermore, if there was any discrepancy, as I told you, and there were some cartons with some cigarettes missing and they were called to my attention, and that made me think they transacted business in a fair way, so I did not think it did me very much good to look at the packages closely. I was very busy with my own department and never gave so very much time to this cigarette deal. [83] That package on top there, I don't think was in the same condition as it was when they were delivered to the Pacific Sales Company. The remainder of the packages are in the same condition. I don't think I noticed any mark on any of these packages. In fact I did not

(Testimony of Arthur Frank Fitch.)

look for any marks. I did not notice that the holly strips around these packages had been removed. I saw a large quantity of Camels and Chesterfields, but none of these. The Camels and Chesterfields were so popular. I looked at the Chesterfields packages and checked these up for a deficiency, but never looked for any marks at all. We thought it was so legitimate that I did not think it necessary to do that. We have never had the cigarettes delivered to us in that condition with the scratches on them. I don't know as I would notice that until you called attention to it. As a rule, they were stacked up in 5 M in a big block. It is now clear to me that there has been something scraped off the brands of the packages. I don't think I had the package in the store very long. The delivery started in the middle of September and ended in October, I suppose. We had these packages coming into our stock for a period of about two months, and in all about four million cigarettes were delivered, and if I ever noticed any of these marks before I did not pay any attention to it. They were packed up in 5 M to a package and I might have noticed that. Furthermore, during the conversation with Mr. Rosenthal it refreshed my recollection about the goods being scratched up, but the contents were not. These were not packed up or stored in packages of five. When we received them on the sidewalk we trucked them in and we then packed them in packages of five and I only looked at them casually. I did not notice any brands or marks on them. I did not think there were any goods like this

(Testimony of Arthur Frank Fitch.)

or anything wrong with them. I thought it was a legitimate deal so why should I expect it. I would not necessarily wait to see when I ordered Chesterfields or Camels that I got Chesterfields or Camels. I receipted for the cigarettes and the office did the rest. If it was Camels one time it was Lucky Strikes the next delivery. I [84] checked them all up to see that they were delivered and it was all entered in the receiving book and the record will show you what we received. I never identified either of these men to any of the bankers here. I think they brought back the check for identification or something and I signed it, or else the bank called up. I made no inquiries to know that that man was Burke. I was present at the commencement of the discussion of the contract, but may have gone in the office afterwards. There were freights that demanded my attention elsewhere. I did not go to lunch with Joe Rosenthal and my wife. We could never go only one at a time. My wife went with Mr. Rosenthal, and I did not. I heard the terms of the contract to this effect, it was to be made in three payments. I do not know whether it is authentic or not, I could not say. I believe I read the contract; I cannot say, but don't know the exact substance. I suppose I may have read it. I know I signed it.

On redirect examination, witness testified in substance as follows:

The money was not paid for these cigarettes at once on their delivery. When they were received I

(Testimony of Arthur Frank Fitch.)

notified them in the office to that effect and they sent out to San Francisco and told them how many were delivered and the money was sent for the goods. My wife did all of the telephoning. I was not there. Don't think I asked Mr. Young or Mr. Burke where they resided although I may have done so. The conversation where they lived was gone into and they stated something. I saw both the contract itself and the letter that was written one month prior from Maurice Rosenthal. Our records do not show the address of these men at all. Whereupon witness' attention was called to Defendant's Exhibit "G" and he testified that it was the letter that he saw. By reason of that letter I never requested an affidavit from either one of these men. I thought that was sufficient when the man gave us his word to that effect, and we took it for granted that was all that was necessary. I could not tell [85] when I first saw this letter. It came in the ordinary course of events through the mail and it was opened. I suppose it was received on October 1st, 1919, as it is dated that date. Whereupon witness was shown Exhibit "F" and asked whether this is the contract that he saw and he replied, "Yes, that is your contract." I suppose my signature on the bottom as a witness and the date shows October 31st, and Mr. Burke gave his address as Gerber. I attended to all of the shipments of cigarettes to San Francisco. They were shipped by the Capital Van or another railroad. Whereupon, certain shipping receipts were shown witness and he was asked if he could

(Testimony of Arthur Frank Fitch.)

identify them and he replied "Yes, that is them." All the cigarettes that I shipped to San Francisco were shipped in open and ordinary transportation. I am now in business at Wheatland with my wife, in a general merchandise establishment and have been there since the 2d day of January, 1920, and have no business connection with the Rosenthals at the present time, nor have I had since I left their employment. We never have a thing to do with them, and my business to-day is owned by myself and wife. The Pacific Sales Company, or Mr. Rosenthal or his son, own no interest in our concern. I have not had any interest in the concern of the Pacific Sales Company or the business conducted by the Rosenthals except the interest of an employee on a salary basis. I never did have any interest in the Pacific Sales Company at all. I was only a salaried employee and my wife was only interested as a salaried employee.

Testimony of Estelle Lewis, for Defendant.

ESTELLE LEWIS, a witness called for the defendant and duly sworn, testified in substance as follows:

That her name is Estelle Lewis and resides at Santa Rosa and has resided there since February, that she was employed at the Pacific Sales Company in Sacramento from July of 1919 until the first of the year, 1920, as head cashier and bookkeeper. That she knows Mr. Maurice Rosenthal and Joe Rosenthal; [86] that she is now in Maurice Rosen-

(Testimony of Estelle Lewis.)

thal's employ and has been at all the times mentioned in her testimony. As chief cashier in the Sacramento store I had charged of all books and the cash and records; that she remembers the transaction first had with the man by the name of Young and also by the name of Burke. I remember they were paid in cash. I remember them coming in because I handed them the cash and I think they were dressed ordinarily. There was nothing remarkable about their dress. There was nothing about their appearance or dress or manner that indicated any suspicion in our minds. On the first transaction I gave the money to Mrs. Fitch and was present when Mr. Burke and Young received the same and made a record of it. This record is always sent to the head office. We always keep a cash-book and the cash-book and records we send to the head office have to correspond. This transaction occurred in the ordinary course of business. There was no discrepancy about it or anything of that kind. Whereupon witness identifies certain books and testified as follows: "This is the receiving-book, this the cash-book and this is the stock-book. The transaction to be entered in regard to these packages would be in the cash-book, because it was a cash transaction. It was September 14th and is found in the cash-book in Mrs. Fitch's handwriting and it is for Camel cigarettes in the amount of \$597.00. I was ordinarily in charge of the said books and this entry evidently was not made in the stock-book or the receiving-book and was not transferred to the cash-book. The record would

(Testimony of Estelle Lewis.)

be duly recorded that way to the general office in San Francisco and this was so reported. This transaction was handled in the ordinary course of business. No secrecy or concealment. I think the second transaction was made also in cash, on the 27th day of September, 1919, in the amount of \$720.00. It is entered in the book in Mrs. Fitch's handwriting and duly reported from there to the head office at San Francisco to Mr. Maurice Rosenthal. Mr. Fitch kept the stock-book identified by witness as the receiving-book. It was in my office but I did not have charge of it. I was in the office most [87] of the time and handled all of the cash. I was present at the conversation when they, Young and Burke, came in and they were talking there but I don't remember much about it. There was once when they were talking about a check coming up and we had to pay the rest in cash. I think it was \$100, but cannot remember the figures exactly. There was a part to be paid by check and the balance paid in cash. Young and Burke divided the money in the office. There was nothing about either one of them that indicated that there was any dishonesty. They were not in any hurry; they seemed to take plenty of time. I recall Mr. Joe Rosenthal coming up and was present during part of the conversation held there. I heard some of the conversation, was sitting a little away from them just a few feet. There was a question in the morning here with these men in regard to a contract. I remember they discussed the contract, Mr. Burke and his friend; Mr. Joe Rosen-

(Testimony of Estelle Lewis.)

thal and I think Mrs. Fitch was there. Joe Rosenthal was talking some about the payments and Burke's friend objected to part of it, and became very indignant about something. He wanted two payments, or something like that, but then Mr. Burke calmed him down a little bit and they agreed to come to the terms suggested by Mr. Rosenthal. There was something said by Mr. Burke and Mr. Young in regard to giving a bill of sale at the time of delivery or payment of the goods. I think they were going to put it quite a few weeks later. I know they were going to pay it at a later date and they were to make two deliveries, I believe and three payments. At first in regard to the payments at a later date it was not satisfactory to Mr. Young but after Burke had talked to him he finally agreed. I think the payments were to be made several days after, but I do not know when the goods were delivered. All that I knew was when they called for the money and when the goods were delivered, I don't know. [88]

On cross-examination witness testified in substance as follows:

I have the ledger showing these transactions. Whereupon witness allowed counsel for the Government to see and examine it and calls attention to Mr. Burke's accounts and identifies them as being "where all these crosses are." I kept no separate ledger account. Whereupon witness indicated the cash-book and showed the attorney for the Government the first transaction with these men, and fur-

(Testimony of Estelle Lewis.)

ther testified that this particular entry is not in her handwriting; that she kept the books but that was made in the evening and possibly Mrs. Fitch filled it in for me. We were very much rushed at that time. The book does not show to whom this \$597.00 was paid. It shows what it was for; it was mostly for cigarettes. I merely balanced the cash, we had to balance it every night to show whether there was money coming in, money going out and money on hand. Not all of the entries are made in my handwriting, but all the entries concerning Young and Burke were in my hand writing in the stock-book. Witness identifies the instance in which the handwriting was Mrs. Fitch's and the handwriting which was her own. The transaction was merely entered and not the name; names are entered in the stock-book. When we have an open account we do not keep a ledger account at all, merely keep a record, because we send all our reports to the head office and the real books would be in the main office at San Francisco and I presume there would be an account under the name of F. W. Burke or under whatever name it was at that office, covering all the transactions we had with these men, but I don't know because I have never seen it. The book called the journal is for goods received and is in my handwriting. The item for \$1040.00 was paid by check. There was no payment in cash, it was paid by check, which I would not put on the cash-book. The stock-book does not keep all records of the trans-

(Testimony of Estelle Lewis.)

action. Whereupon the following question was propounded:

Q. "This is not a complete record of all the transactions? [89]

A. All that came by check. The first transaction shown here is dated October 8th and the entry is by a transaction with Burke. All the other transactions were entered as Burke. Witness stated the other transactions or entries made prior to October 8th are in the cash-book but no name put after it. Whereupon the following questions were asked:

Q. "Show me in this book the transaction covering the 39 cases of cigarettes.

A. If you tell me what the date was.

Q. On or about November 10th or 11th.

A. The 11th, that was Sunday, evidently, because it is not in here.

Q. See the 12th then.

A. No, this is the cash-book and that was not for cash.

Q. This is one for cash.

A. I don't know about the other entry, if it was paid for.

Q. Were part of the goods delivered at that time paid for in cash?

A. I don't remember, if it is not there."

Witness was directed to examine and ascertain all the dates beginning with November 10th up and including the 12th, and stated that there was no transaction in there, that there is nothing there to show any cash payments at all, that the goods that came

(Testimony of Estelle Lewis.)

in were paid by check and showed on the stock-book. The entry on the stock-book dated November 10th, F. W. Burke, \$467.28 was made at that time and is my handwriting. All these entries are made from invoices or receipts in the form of an invoice and the invoice is O. K.'d by Mrs. Fitch and left on my desk and then I entered them in the stock-book. Everything was O. K.'d by Mrs. Fitch. When there was no cash paid out we made no entry in the cash-book, but if cash was paid out at all, I would make an entry. [90]

Testimony of Joe Rosenthal, for Defendants.

JOE ROSENTHAL, the defendant, was called as a witness in behalf of the defendants and duly sworn, and testified in substance as follows:

That he is the son of Maurice Rosenthal and is the general sales manager of his father's firm of the Pacific Sales Company. That he worked during the month of September, October and November in the year 1919. That he will be 24 years old in a short time. We have a chain of general merchandise stores in all the various cities along the coast, eleven in all, besides our main office. We handled practically everything in the general merchandise line, which is naturally groceries and tobacco. We have a little of everything in all lines. We have stores in Bakersfield, Visalia, Fresno, Stockton, Santa Rosa, Vallejo, Sacramento, Oakland and two stores in San Francisco and our main offices and warehouse. Our concern at Battery Street buys most of the goods

(Testimony of Joe Rosenthal.)

and we ship them to the stores, that is, with the exception of groceries and tobacco, which they buy from jobbing houses in the towns they are in mostly. On December 1st of last year and the first of this month there were purchased about \$3,000,000 worth of general merchandise, groceries and tobacco. I have the statement covering these purchases segregated by months. From December 1st, 1919, to the first of this month we have purchased in tobacco \$450,316.54, an average of \$35,000.00 per month. A large portion of this, about 60%, is in cigarettes. My attention was first directed to the purchase by the Fitchs of these cigarettes involved in this case around September 12, 1919. My attention was called to a telephone call by Mrs. Fitch to my father, in which she asked him if she could purchase some cigarettes which she had quoted at \$5.00 per M, and my father asked me—I was then in the office at the time—if \$5.00 per M was a good price on Camel cigarettes. At that time Camel cigarettes were costing us \$6.35 with a discount of 10% and 2%. We have purchased cigarettes from Bollman & Company during the entire year and have been allowed by them 10% and 2% discount. [91] That day Bollman said that cigarettes were \$6.00; that was in November, less 10% and 2%, and the cigarettes would net about \$5.30. This purchase of September 14th, of Camel Cigarettes, came to my knowledge at the end of the month. Nothing came to my knowledge until the next time I was in Sacramento, that was the end of September. I generally went up at the end of every month to

(Testimony of Joe Rosenthal.)

prepare the sales and start the next month. I was up there around the 29th of September. I first spoke to Mr. *and Fitch* about it after supper. I generally used to come up on the evening train getting in there about 5 or 6 o'clock and after supper we would go back to the store, and I noticed some of the cigarettes there. They told me that they had been buying them from a man by the name of Burke. I noticed the word "P-I-E-R" was on one case and word "W-A-S-H" on another. I asked him if they were not Government cigarettes, because I had proper reason for figuring that they were Government goods, because in the latter part of last year at Fort Vancouver Barracks I had personally figured on a large quantity of groceries, tobacco, clothing and shoes and camping utensils which the Government had for sale. They had in the neighborhood of \$100,000.00 worth of tobacco which I figured on in conjunction with Sugarman & Greenburg, and Mr. Greenburg himself made several propositions to buy clothing. I had an idea that those were some of the lot of tobacco which was sold by the Government up there. We didn't get this tobacco. It was sold to Heckfeldt Bros. of Seattle rather cheaply, it was all offered together, and Hackfeldt Bros. bought this tobacco from the Government at approximately sixty cents on the dollar. About 85 cents on the dollar for the biggest part of them, brought it down to 60 cents on the dollar. I personally bought some of the tobaccos from that firm. They offered some Old English Curved Cut Tobacco which was from this spe-

(Testimony of Joe Rosenthal.)

cial lot up north, amounting to about \$5,000.00 worth and I had a list at that time. That tobacco was selling at twenty-three dollars a gross and they offered me that at \$1.40 a dozen, less 25%, which is less 10 and 10 and 5, but [92] as the lot was too big for me to handle of this particular brand of tobacco, I called up Harris & Company of San Francisco, who are associated with Ehrman, and I am not sure but I think they bought it all. I bought some of this firm Harris & Company under date of June 23d, 1919 at \$1.44 per dozen, less 10 and 10%. The market price at that time as \$23.04 a gross as given by the approval from the American Tobacco Record. I secured a bill from the United States Spruce Corporation at Vancouver. The Government was selling tobacco and some other goods at a discount. Here is an invoice from the Government for 34,000 dollars worth, of general stores issued from Vancouver in July, 1919, where they allowed a flat discount on their goods of 30% and even over that. We have bought goods from the Mare Island Navy Yards, one bill dated May 11 of this year, for groceries and cigarettes, 75,226 packages, which goes to two big wholesalers and we subsequently resold them to different people at $10\frac{3}{4}$ cents a package. We did not purchase from them, not of this lot. I purchased some of them from Joe Lieberman in a small lot and paid $10\frac{3}{4}$ cents. I have not purchased tobacco from the Government prior to last year, with the exception of that which was Government property. We purchased from the jobber. My concern

(Testimony of Joe Rosenthal.)

got bids right here from the Government at Mare Island wherein we bid. These were accepted on March 23d, of this year. We had no bids in prior to that time. When I saw the cigarettes, I spoke to Mr. and Mrs. Fitch and they were of the same conclusion I was. The next time I returned to Sacramento was about October 30th. We went to supper and then we came back to the store and it seems that day Burke had been in there and left a big lot of Lucky Strike cigarettes which I saw in the store and Mrs. Fitch told me that Burke had said to her that he wanted to see me or that he had a lot of cigarettes, about two millions and a half, which he wanted to sell. She told me he was coming in that night and that I was to see him in the morning. She also told me that she [93] had spoken to Mr. Mitau. The next day I saw Mr. Burke and Mr. Young. About 11 o'clock in the morning they came into the store and Mrs. Fitch took me over to them. We went into her office. Mrs. Fitch, Mr. Burke, Mr. Young and Miss Lewis were present. Then I asked Burke how many cigarettes he had to sell and he told me he had in the neighborhood of two to two million and a half, but did not know exactly how many, but he might have a little bit more than that. I asked him how much he wanted for them and he said \$4.50 per M. and then I asked him where these cigarettes were located and he told me Roseville. I told him that that was a pretty big lot of cigarettes and I asked him if he could split them up in delivery and also in payments of the same. He said he was willing to do so as he

(Testimony of Joe Rosenthal.)

was not in a hurry for the money. I suggested to have at least two deliveries, one on short time or at once and one at the end of the month. I told him that I might be able to make the payments in three installments, one-third on December 1st, one-third on December 15th and one-third on January 1st, but Mr. Young objected saying that the payments should be made in two instead of three installments and Burke finally decided that three payments would be satisfactory. I then asked him if they came by these cigarettes legitimately, at which Mr. Young grew quite indignant and said he had come by these cigarettes legitimately because if he had not he would not have been willing to extend the time and credit to us and that the very fact that they had such a quantity of cigarettes as they did and that they were willing to give us time should assure us that they were legitimate. I asked Burke if he would be willing to guarantee to us that he obtained these in a legitimate manner, that is, if he would give us a clear bill of sale with each one of the deliveries and would guarantee that these cigarettes were not obtained in an unlawful manner and he said he would. I told him then I would let him know later about these cigarettes. I also asked Mr. Burke if these cigarettes were government cigarettes as I told him I had noticed the mark "P-I-E-R" and "W-A-S-H." I don't remember [94] the answer he made to that question, but from the way I got it I was under the impression at that time that they were out of the same lot. I told them to come back in the evening or

(Testimony of Joe Rosenthal.)

the afternoon and I would let them know. I went to lunch with Mrs. Fitch and while we were at lunch I put in a call over the long distance telephone to San Francisco, to my father, and told him I had an opportunity of buying 21½ million cigarettes at the price of \$4.50 per M. He asked me where I considered the cigarettes came from and I told him I thought they were Government property. I told him the men were satisfactory and would sign a contract guaranteeing these cigarettes were obtained in a legitimate manner and that they were willing to split them up into three payments, and he said under those circumstances he thought it would be all right with the contract. So we had a stenographer draw up that contract. I went back with Mrs. Fitch to the store about two o'clock. Burke came in by himself and signed the contract, and I also signed it. Mr. and Mrs. Fitch signed it as witnesses. Then Burke left and that was the only time I ever seen either of them, Burke or Young, until in court here to-day.

Witness identified Defendant's Exhibit "F" as the contract which is spoken of and said that they were signed in triplicate, that they had been dictated to the young lady at the hotel. That I was in Bakersfield when I had the first intimation that these cigarettes were stolen. It came to me over a telephone call from San Francisco office to our Bakersfield manager before I got down to the store. He was advised that the cigarettes were not to be sold, but were to be held and that the order came from San Francisco. I thought that was funny but didn't

(Testimony of Joe Rosenthal.)

say anything about it until I got back to San Francisco. Whereupon witness identified the different signatures on the different receipts from different stores for tobacco that were turned over immediately after it was found they had been stolen. Whereupon counsel for defendant [95] offered in evidence the receipt which Mr. McShane had identified on trial of the case. They were admitted and the Court stated that he did not think it necessary to read them. Whereupon witness continued: I know nothing about any Fatimas and to my best knowledge there was no money being paid until the contract was made. I knew that Mrs. Fitch entered into a transaction whereby she wrote for a check that was for a prior sale of 25 M Lucky Strike cigarettes.

On cross-examination witness testified in substance as follows:

That there is no tobacco on the paper handed to Mr. Ash upon witness' examination with reference to the Vancouver sale; that witness does not recall having purchased anything from the Government in the way of cigarettes or tobacco during the month of October, 1919; that in November, 1919, he made a bid that I was first speaking about, probably by some sub-jobber who purchased from the Government some time prior to that time. I believe it was last November; I am not positive. These big lots of tobacco from the Government are sub-jobbed, and they are well-known jobbers, some of them, some are not, according to the men that buy them. Large jobbers get notice from the Government of

(Testimony of Joe Rosenthal.)

sales every day with reference to all kinds of goods. We have received lots of notices of tobacco being sold by the Government and possibly received notice of the tobacco being sold by the Government around the months of November, October and September, 1919. I am not certain whether we received any notice at all of any tobacco that was being sold in the State of California amounting to over 2½ millions of cigarettes. I could not tell whether we received any notice at any time around there of 2½ millions of Camels, Chesterfields and Lucky Strikes being sold by the Government. I believe we received notices from some sub-jobbers offering goods for sale, from several eastern concerns offering us tobacco that they had bought from the Government, but not in this state. It did not strike me that this was an extraordinary amount or quantity of cigarettes. [96] I thought that Young and La Veque at that time were jobbers. I thought they had bought these cigarettes and wanted to resell them at a profit. We do not necessarily buy merchandise through jobbers. We buy entire stores out and all sorts of goods in that manner, cigarettes, tobaccos and all kinds of merchandise; buy also through jobbers; place bids at public sales. I never had, before this time, purchased 2½ millions of cigarettes, from anyone but a jobber. One purchase I did buy 2½ million cigarettes at one time from a jobber, but in a few weeks, in our store, we do. I never in my life, particularly during the year 1919, figured with any jobber for 2½

(Testimony of Joe Rosenthal.)

million cigarettes. Witness identifies Defendant's Exhibit "G," which is dated October 1, 1919, to Mrs. Fitch, and signed in typewriting by Maurice Rosenthal, and said the first time he saw that letter was after he was indicted, that he kept his father well informed of what was taking place, and makes regular visits to our places of business and knows what is happening thereabouts, but don't get time to inform his father on everything; that he goes from store to store, gets around to them every month. That they haven't a stenographer in their store and don't think that they had a typewriter there when this contract was prepared, and that he drew it up, dictated it to a girl in the hotel. He left those blanks because he did not want anybody to know where he bought these cigarettes, or who was buying them, because he figured they might try and get a contract from these people by paying them a little more probably than we were paying them. As this was a big sale, Mr. Mitau wanted to find out from whom they were getting these cigarettes and wanted to buy them for himself. I did not want anybody to know where we got these cigarettes because I figured they would try to buy them and I figured that Mitau might buy these cigarettes. He wanted to do so. I did not figure on the fact that Mitau would purchase any cigarettes in the condition these were in. I had seen packages of some of these cigarettes before I entered into a contract, [97] but I never really examined them to notice whether the packings looked like this one,

(Testimony of Joe Rosenthal.)

that is, that something had been cut off. I saw them in the store in the night-time. Two and one-half million at \$4.00 per M would make \$11,250.00. That is quite a considerable transaction. Never before had I purchased any cigarettes from anyone in that quantity at that price, but previous to this contract being entered into Mrs. Fitch had already paid about \$3,500.00 worth of cigarettes from these people and everything seemed to be legitimate, so I was well satisfied with their judgment or else I would not have entered into a contract with men whom I did not know. They told me what was in the contract and that they left out Gerber but didn't tell me what business they were in nor where they banked, nor who vouched for them, but the Fitches told me that they considered them responsible. I considered that if they had 2½ million cigarettes, that it was possible they bought 2½ million cigarettes, probably from this Vancouver tobacco and I thought they were sub-jobbing. We haven't a list of every sub-jobber in San Francisco. There were lots of speculators in merchandise coming around every day, probably not with 2½ million cigarettes. I put "2½ million or more" in the contract because they stated that they did not know exactly what they had. They might have 2 million and they might have 2½ million or a little more; I was to take what they had at \$4.50 per M. They said they had in the neighborhood of 2½ millions. They told me the cigarettes were at Marysville. I put in the contract that they lived at Gerber. He gave me his residence

(Testimony of Joe Rosenthal.)

at Gerber, but he said that he had the cigarettes stored at Marysville. I did not ask him how long they had been stored there nor how much he paid for the cigarettes, nor where they had bought them. I asked him for a guarantee that is specified in the body of the contract. Didn't ask him to give any indemnity bond for the faithful performance of the contract. I considered this quite an artful contract and didn't want Mitau or anyone else to know anything about it. It didn't occur to [98] me to ask them to have two persons go on this contract for the faithful performance of it. I made no inquiries at all as to who these two men were. Did not go to my banker to see if he knew who they were; not to anyone. Burke and Young got there in the morning and had the talk with me. Young didn't have any talk. He was in there with Mr. Burke. He objected to some part of the contract. He took an active interest in the matter on these two times. I didn't have his name in the contract because he was not the man who drew the contract. He was not the man who owned the cigarettes or the man that I was doing business with. He did not belong in there and yet he protested in regard to the terms of the contract. The reason I didn't ask him what interest he had in it was that I already had the contract drawn up with the man who owned the cigarettes. I was not there at the time of the first transaction. This contract provides for a bill of sale with each delivery, but we haven't got any such bills of sale. The contract provides for Camels, Lucky Strikes,

(Testimony of Joe Rosenthal.)

and Chesterfields. I didn't ask them whether they had any Omars, Fatimas or Piedmonts and don't know anything about why these were purchased. The 39,000 were purchased outside of our contract. Nothing was specified in the contract about Fatimas, Omars or Piedmonts, but that we were willing to buy them at \$4.50 per M. Fatimas were sold for \$5.00 per M. There is a separate bill for these, they were bought separate from my contract. When they were bought I was at home in the San Francisco office and no part of them applied on the contract. I saw Mr. Young in the store but once and in the morning. I was speaking mostly with Mr. Burke at that time and Mr. Young was present. I have heard since then an occasion where the money was divided in the store between Young and Burke. Whereupon witness produced statement of account with Maurice Rosenthal from John Bollman & Company, dated some time in 1919, and testifies that the price of Chesterfields then was \$6.00 per M, less 10 and 2, and that would be about \$5.30; that the price of other cigarettes, such [99] as Fatimas, were \$8.00 less 10 and 2; that the date of this statement is February 24th, 1919. The price given on these cigarettes might have increased. They did rise and were higher in the month of September, October and November. Whereupon the following questions were asked:

Q. "If you had no idea that these goods were stolen or no indication that they were stolen, why did you put these words in the contract.

(Testimony of Joe Rosenthal.)

A. I put them in as a sort of protection.

Q. How would it protect you?

A. I am not an attorney, I do not know. I thought that it would."

I had no attorney advise me in drawing up that transaction. Drew it up myself. They had purchased a considerable amount of cigarettes from these men before and when I purchased these I put that in as a protection. I thought that it would fully protect me, and it occurred to me that it should be put in there to protect me. I was then buying \$11,250.00 worth of cigarettes at \$4.50 per M; I never purchased any cigarettes at all during the year 1919 from the Government directly. I cannot say that I have or have not seen any packages at any time sold by the Government in the condition these packages are in, I mean with Christmas wrappings on them. I have seen packages sold by the Government in the condition these packages were in. I think they even come in worse condition. They did not have the name of the jobber on them and jobbers have delivered to us packages that did not have a name or address on them. Witness saw package with the words "P-I-E-R" and the one with "W-A-S-H." I stated that I noticed that they had those marks and asked him if they were Government goods and he never answered me and I never inquired further from him. I think I mentioned it to him once about the Government goods that were to be handled, and from the way I got him he left me with the impression that these were some of the same lot, but I could not say

(Testimony of Joe Rosenthal.)

that he did not tell me anything at all about it. Did not purchase any cigarettes from the [100] Government or see that they were purchased from the Government that did not have the Government stamps on them as sold by the Government. The Government had, as I explained before, in the neighborhood of \$180,000 worth of tobacco, and furthermore they had sold a big part of it to whoever bought it, to whomever paid the biggest price. This was in April, 1919. The Government owned these cigarettes on the basis of \$6.00 less 10 and 2 or \$5.30 net, and the Government would not pay more than that, and they sold them at a discount off that price, but did not sell me anything. I knew these cigarettes had been purchased by somebody else, and I figured that these cigarettes were like these which were sold to us. Thought possibly they might have been. I tried to buy them at a less price and I figured that they were part of these goods. Whereupon the following questions were asked:

Q. "Did you ever see any cigarettes that the Government had prepared for export? A. Export.

Q. Yes, for the army of the soldiers, that had the Government stamp on them for export to Vancouver barracks.

A. The Government did not prepare them for export to Vancouver Barracks. They were put there in the hands of the Spruce Production Company and were offered by them for sale."

I knew of other cigarettes that were for sale by the Government during the year 1919 but cannot give

(Testimony of Joe Rosenthal.)

you that from memory. If I went down to our office I could give you any number of lists where the Government offered tobacco all over the country. I never personally carefully examined these cigarettes to see whether or not they had been shipped by any transportation company to either of these men. There was nothing suspicious about these boxes having anything stripped off of them. I never closely examined them. I have bought packages of cigarettes and other things from the Government in the condition in which these packages are in, and I have bought entire stocks of fire goods, stock of goods that are partly burned, and they are all worse than that. Whereupon the following question was asked: [101]

Q. "Did you ever buy any in this particular condition, that is, as far as the names and addresses are concerned; did you ever buy any where the names and addresses were torn off?

A. I have bought them lots of times.

Q. Where? Answer my question.

A. Well, I am trying to.

Q. Did you ever buy 2½ million cigarettes in the condition that those cigarettes are in?

A. No, sir."

WITNESS.—(Continued.) To the best of my knowledge I never saw this letter dated October 1, 1919, until after the indictment was presented in the case. I heard that such letter had been written but I did not see it. My father told me he had written to Mr. and Mrs. Fitch, and told her to investigate who was selling her these cigarettes. That was written

(Testimony of Joe Rosenthal.)

after he had written the check that they had, and then they told me she had answered she was satisfied that the men were honest. At the time I entered into the contract upon October 31st, I knew that other sales had been made to our concern by Young and La-Verque.

On redirect examination witness testified in substance: I never saw the cigarettes that the examination is about, these Fatimas. The only cigarettes that I saw physically the first time are when I saw them here. The Fatimas were delivered. I never saw the Fatimas. I never saw any cigarettes that were delivered under the contract.

On recross-examination witness testified in substance, that he saw Lucky Strikes in stores at the time. I don't know whether these are the cigarettes or not. I saw some Camels but do not remember of seeing any Chesterfields. I did not notice with reference to the packages in which they were, whether they were the packages I saw there; with reference to the condition of these packages, that the names torn off of the cigarettes in the same condition as they now are. Whereupon it was [102] stipulated in open court by respective counsel that the date on which the 39 cases were turned over to the Government was on a Tuesday, November 18, 1919.

Testimony of Maurice Rosenthal, for Defendants.

MAURICE ROSENTHAL, a witness called and sworn in behalf of the defendants, testified in substance as follows:

That his name is Maurice Rosenthal and resides at

(Testimony of Maurice Rosenthal.)

San Francisco, California. His business is whole-sale furniture and a general chain of stores; that the name of his business is Maurice Rosenthal and that he does business under the name of the Pacific Sales Company and sales store; that the Pacific Sales Company is owned by him; he is sole proprietor. He knows Joe Rosenthal, his son. Knows Mrs. Lewis and Mr. and Mrs. Fitch. They are all his employees. I have heard all the testimony introduced in this case. All transactions that have been testified to occurred when I was at my office at San Francisco, and I never, at any time, was in Sacramento. I do not know the men known as Young and Burke. I never have seen them until to-day when they were on the stand. Never had any conversation with them. I have been in business for myself and as a partner since 1880, on Sansome Street, over 40 years ago in the same line of business. The conversation with Mrs. Fitch over the telephone was that they had offered us these cigarettes and I handed it over to my son, and asked him what the prices were. My instructions to Mrs. Fitch was that if it is all right, to buy them if she considered everything regular. Whereupon the following questions were asked:

Q. "In other words, if this had been a dishonest transaction, would you have permitted your concern to have anything to do with it. You can answer that yes or no, and then explain. A. No, sir.

The COURT.—If you wish to explain that answer you can do so now. [103]

A. My position—why should I think of buying

(Testimony of Maurice Rosenthal.)

hundreds of dollars worth of cigarettes if it is not legitimate for a few thousand dollars? I had, the first of last month, October, a business of \$365,000.00 in one month. It is ridiculous for me to think of buying or getting anything that is not aboveboard."

I wrote the letter to Mrs. Fitch on October 1st. I dictated that letter and authorized it. I mean by the instructions that "if you have any doubt on the subject, let him take his goods back as I don't want to get mixed up in a disreputable proposition." Just what I said there. I meant exactly what I said. I was not present in Sacramento when these transactions were had and knew nothing about them except the reports which I received. There never was anything at any time from the reports which I got from my people that indicated to my mind that this was a disreputable transaction, or that the goods had been stolen. I believe I received a telephone message or letter from Mrs. Fitch, telling me for the first time the goods had been stolen. I remember Mr. O'Connell and Mr. McShane coming on a visit to me. My groceryman was present when they came in. They came in there early in the morning and my man took them into my office. He is my grocery buyer and he told me about these two gentlemen and he brought them in. As soon as they stated their case, I instructed the telephone girl to telephone to all the different stores where the cigarettes had been sent, to stop the sale if they had received the cigarettes. I think these goods were shipped to 49 Battery Street a day or two before. Before I did anything else I

(Testimony of Maurice Rosenthal.)

notified the telephone girl to stop the sale of them and hold them for disposition by the Government agent. I restored all goods that it was possible to be restored to the Southern Pacific Company. I think I paid out about \$2,000.00. I don't remember exactly how much. I did not, at any time during the period of these transactions, buy these goods or authorize them being bought, knowing that they were stolen. It would have been ridiculous to think of that. I [104] have been forty years in business. There never has been anything against me.

On cross-examination witness testified: I had a telephone message from my son at the Travelers' Hotel with reference to the contract, regarding the 2½ million cigarettes. Joe said these men looked all right; that they had the cigarettes and believed that they came up to quality, and that he thought the cigarettes were from Washington from the Government supply which they had stored there, and I told him that if the price was all right, I would leave that to Joe. I never bought anything in groceries or cigarettes, or anything like that; so I told him if it was all right and the price right, to go ahead. Furthermore, I told him unless they were badly up for money, and this was a large sum of money to talk about, to be careful and see that I got time on it, as it was too much money to be paid at one time. Joe told me that the price of \$4.50 per M was lower than we could have bought them at that time—lower than the regular prices. I wanted to postpone the time of payment because in the first place that

(Testimony of Maurice Rosenthal.)

amount of money is hard to raise and so long as I could get time on it it was much better to purchase that way. That was not an unusually large purchase for me to make. Whereupon the following question was asked:

Q. "Did you ever purchase in the year 1919 2½ million cigarettes from anybody else at one time?"

A. I told you before, I am not buying cigarettes. It is not in my department. I am buying the furnishing goods, clothing and drygoods.

Q. Does the man who is at the head of your department go ahead and you don't know anything what he purchased?

A. Well, I would know something about it—nothing definite.

WITNESS.—(Continued.) I signed checks and sent them up there to Sacramento for cigarettes.
[105]

Whereupon the following question was asked:

Q. "As a matter of fact, at each purchase, of each different lot of cigarettes, you were notified, were you not, of the purchase of these by Mr. and Mrs. Fitch by telephone or otherwise, authorizing the purchase of each lot.

A. The first one, as you remark, yes, the second one, no, the third one, the letter came with the bill, but you have got my letter there, I think. That is just how it happened."

Whereupon witness continued: That Mrs. Fitch called me on the first sale and I authorized her to pay for them in cash. I don't remember anything

(Testimony of Maurice Rosenthal.)

about the second one. The contract involved a considerable sum of money, but that is an everyday occurrence for me to buy. We buy every day in the year and to give you an idea of purchases, we bought over three million dollars in a year. We did, as I stated before, a business in October of over \$365,000 and in November it was about the same. I did not want to have a contract drawn up covering this matter, although my son rang me up before the contract was signed and I told him to go ahead and buy the goods. I told him to get this time because it involved the payment of \$11,000.00. I thought it was best to delay it if we could get some time on it. In buying a thing you always want to get the best terms you can before you make the deal. I did not authorize my son or tell him to get any guarantee or any bonds, or look up these men and see whether or not the contract could be enforced. Why should I have a bond when I have time on it and have got the delivery of the goods. I did not see the contract and authorized my son to proceed with it. I think I saw the contract afterwards. Mr. and Mrs. Fitch's letter informed me whom they were dealing with. I thought they were dealing with a speculator by the name of Mr. Burke. I never knew Mr. Young. The contract is signed by Mr. Burke. I had a conversation with O'Connell and McShane in my office. I did not inquire of either of them regarding the responsibility of either Mr. Young or Mr. Burke, except that after Mr. McShane had been telling me that these goods [106] were stolen I

(Testimony of Maurice Rosenthal.)

showed them the records, at least I told the office to, told them to look over the records and see how much they amounted to and report it to me. They told me that it was between \$2,500 and \$2,700, and I asked Mr. McShane and Mr. O'Connell, or both of them, if there was any chance of getting any money back from these people, and they told me that one of them had a house in Roseville and they would help me to get back all I could. I then instructed my manager in Sacramento to go to the bank, and I told her to get references and to get an attorney and commence suit against these people. I don't remember which one they told me had the house in Roseville. I don't know which one, Young or Burke, she commenced suit against. I referred it to my manager here, who was more familiar with the case than I was. I cannot say whether or not I brought action against Mr. Young; I left it to my manager. I never wrote any banker here inquiring about these men. I never thought that these cigarettes were stolen, or that they had been obtained illegitimately at any time, and it never occurred to me before that these cigarettes might have been stolen. I wrote this letter as a protection to take. In any event, when buying from a speculator, I want them to take due precaution. I recall the language in the letter: "I am in receipt of yours of September 30th, but before sending you check for \$1,040.00 for these cigarettes we want you to make sure that these cigarettes are not stolen," and it did not occur to me at any time that these cigarettes

(Testimony of Maurice Rosenthal.)

might be stolen. I did not tell Mr. O'Connell or Mr. McShane when they were in my office at that time and asked me about this, that I had sent my son up there to find out whether these goods had been stolen. I may have remarked that my son went up there. I did not tell them I sent him to find out if there was anything wrong about it. I glanced at the contract; did not pay much attention to it. It was in the office possession, in mine. The language, "he also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any federal, state or local law [107] law," is in there, and I recall it just as I stated. I probably thought as I see it there, that I considered the deal transacted. I did not pay any attention to it. I figured that the guarantee in that contract was worth something because, according to that, he delivered his goods without any money and I got that money back, that is in the guarantee. I thought the guarantee was worth something. I positively did not say to O'Connell and McShane, in conversation at the office, that the reason an investigation was conducted was on account of my belief that there was something crooked about the cigarettes on account of the low price at which they were offered for sale. I have no knowledge of saying anything of the kind. Mr. Wirtz is not my manager and was not present at the conversation between McShane, O'Connell and myself and I made no such statement as that. I dictated this letter and sent it out without signing; sent out some of my letters

(Testimony of Maurice Rosenthal.)

without signing them, but authorized my stenographer sometimes to initial them. I never looked at the letter. I don't know, if I did; the letter will speak for itself. In addition to what Mrs. Fitch wrote me, this statement at the bottom signed by Burke, I wanted that at the time from Burke as a guarantee of title. You saw the letter Mrs. Fitch wrote me and she said he was an honest man.

At this point the evidence in behalf of defendants was concluded.

**Testimony of W. E. Van Dorn, for the Government
(Recalled in Rebuttal).**

W. E. VAN DORN was recalled by the Government in rebuttal and testified in substance as follows:

My company prepared for shipment cigarettes for the army and navy. They did not prepare any packages of this character here. In the first place, any goods that we packed during the year 1919, the goods were packed in wooden cases. The Government never at any time purchased Christmas packed cigarettes. Any goods for export do not contain stamps and most of them are shipped through San Francisco ports. I do not know of any sales that were made in the year 1919, either in [108] California or in Washington. About May of this year we heard that there was to be a sale at Mare Island of some cigarettes, and we found out that some of our cigarettes were being sold in that sale and we immediately sent a man to Mare Island to buy the

(Testimony of W. E. Van Dorn.)

entire stock so that they would not get on the market. On the 24th of February our prices to Mr. Rosenthal were as he has stated. On the 25th Chesterfields jumped to \$7.50 per M and Fatimas to \$9.50 per M. On September 17th we advanced the price on Piedmonts to \$7.35 per M and the next increase came October 21st, which jumped Chesterfields up to \$7.80 per M and the Fatimas at \$9.80 and the Piedmonts \$7.50.

On cross-examination witness testified in substance as follows: The only difference between the home used merchandise and the export is in the packing. There was a difference there. The Government did not use for home consumption certain goods and also used others for export. I do not know what my firm paid for the cigarettes that they bought at Mare Island. Do not know whether there was any reduction. We took them from Mare Island just simply to keep them from getting on the market. Mr. White, the president of our concern, is the only one who knows what he paid for them. I don't know that the goods were purchased at Mare Island at a reduction of 30%. I don't know what they were purchased at by Mr. Whittaker.

The following is a list of exhibits received in evidence in behalf of the respective parties on the trial of said action and the substance of their contents, viz.:

Government's Exhibit No. 1.—Bill of Lading for 42 cases of cigarettes shipped by John Bollman & Company to various consignees in Oregon, dated

November 7, 1919, admitted to be the cigarettes shipped on that date; that 39 of these cases were stolen as shown in the testimony set forth in the bill of exceptions.

Government's Exhibit No. 2.—Railroad Company's waybill of same 42 cases. [109]

Government's Exhibit No. 3.—Copy of contract of sale from Burke to Pacific Sales Company, quoted in this bill of exceptions, being identical with Defendant's Exhibit "F."

Government's Exhibit No. 15.—Photograph of cigarettes received from the Pacific Sales Company, taken at the store of the company at 6th and L Streets, Sacramento.

Government's Exhibit No. 16.—Same as Government's Exhibit No. 15.

Government's Exhibit No. 17.—List of cigarettes and tobacco purchased by Pacific Sales Company.

Defendant's Exhibit "A"—Receipt dated September 12th, 1919, for \$597.00 to Rosenthal and Pacific Sales Company for purchase of 119,400 cigarettes, signed by W. M. McAllister.

Defendant's Exhibit "B."—Copy of check for \$1,040.00 payable to F. W. Burke, dated October 8, 1919, signed by Maurice Rosenthal.

Defendant's Exhibit "C."—Copy of a check for \$922.50 payable to F. W. Burke, dated October 30, 1919, signed by Maurice Rosenthal.

Defendant's Exhibit "D."—Copy of check for \$2,565.00 payable to F. W. Burke dated November 3, 1919, and signed by Maurice Rosenthal.

Defendant's Exhibit "E."—Copy of check for \$467.28, payable to F. W. Burke, dated November 11, 1919, and signed by Maurice Rosenthal.

Defendant's Exhibit "F."—Contract between Pacific Sales Company and F. W. Burke. This contract was read in evidence and is quoted in full in this bill of exceptions and is identical with Government's Exhibit No. 3.

Defendant's Exhibit "G."—Letter dated October 1st from Maurice Rosenthal to Mrs. Fitch, read in evidence and quoted in full in this bill of exceptions.

Defendant's Exhibit "H."—Receipts to Pacific Sales Company for various packages of cigarettes returned to the Railroad Company, or the Government. [110]

None of said exhibits are deemed of any importance in the case except those read in evidence and quoted in this bill of exceptions, and the above statement of the contents of these remaining exhibits is agreed to be the substance of each and all of them, and may be so considered under the statement hereinafter inserted herein that the above and foregoing constitutes the substance of all the evidence introduced on the trial of the case.

Whereupon the evidence was closed and the above and foregoing is the substance of all the evidence introduced in the case.

At the close of the evidence counsel for the respective parties in open court waived argument to the jury and the same was submitted without argument.

Whereupon the Court charged the jury as follows:

Instructions of Court to Jury.

Gentlemen of the Jury:

(Orally.) It becomes necessary for me to explain a little more fully than would have been the case if this case had been argued by counsel. You will take this indictment with you into the jury-room at the conclusion of the Court's instructions and will have it for reference during your deliberations.

There are two counts in this indictment. I shall comment on these more than I would have done if the case had been argued. The only difference I see in the two counts of the indictment is that the first count charges that the defendants unlawfully, willfully, knowingly and feloniously bought and received 39 cases of cigarettes, etc., and in the second count they are charged with having unlawfully, willfully, knowingly and feloniously received and having in their possession the cigarettes; the first count is for having bought and received, and the second count is for having received and having in their possession.

Then it goes on and describes the Interstate Commerce character of the shipment, what car they were in and the other details that go with such a transaction, which have been explained to you during the trial. [111]

To this indictment the defendants, and each of them, have entered a plea of not guilty, thereby placing the burden upon the prosecution of establishing, by evidence sufficient to convince you be-

yond a reasonable doubt, the truth of every material allegation of the indictment and the existence of every essential element of the offense, before you can convict the defendants, or any one of them. You will consider each count of the indictment separately; that is to say, you will consider each count of the indictment the same as a separate indictment and you will deliberate upon, and determine separately the guilt or innocence of each defendant upon each count of the indictment. Thus, if you have a reasonable doubt, concerning the guilt of one defendant upon a certain count, that defendant is entitled to the benefit of the doubt, although you may convict other defendants upon that count.

The labor of the Court in instruction you in this case has been materially lessened by the statement made here, and stipulated to, that the goods were stolen and that they were stolen while moving in Interstate Commerce. That is not disputed and it will not be necessary for me to go into what constitutes a shipment in Interstate Commerce.

It is not disputed but that, so far as the first count of this indictment is concerned, some of these defendants doubtless bought and received the goods, and so far as the second count is concerned, that they knowingly received and had them in their possession, that is, certain of the packages.

But that which is disputed and the point upon which evidence has been introduced is whether or not the defendants, or any of them, knew that these goods had been stolen. Now, before you could convict any one of the defendants, you would have to

be satisfied beyond a reasonable doubt that the defendant knew that the goods were stolen, and that he bought, or received, them, or that he had them in his possession with that knowledge. If he only learned subsequent to the purchase or receipt of the 39 cases (I believe there are only 39 charged) that they were stolen, you [112] would not find that defendant guilty under this indictment.

If you have a reasonable doubt concerning a particular defendant, the individual that you are considering at the time, whether or not at the time of the purchase or receipt by him of the 39 cases of cigarettes, that he actually knew that they had been stolen, that defendant is entitled to the benefit of that doubt, and acquittal at your hands; and so, as to each defendant. What a man knows is a process of the mind and you cannot see into his mind, or have it laid open before you. You can only arrive at a man's intent by what he says and does in the light of the circumstances under which he says and does it. This includes his conduct before and after he did it.

In his subsequent statements he may make mistakes and do some very unusual things and yet not be guilty; and when I say that, I have no particular reference to the statements in this testimony. But you will have to determine what he knew at the time he purchased the goods, and his subsequent statements may help to show that, as well as his statements made at the time.

In this case, as in every case where you try to determine what is in a man's mind, you can only de-

termine it by circumstances and the things that surrounded him at the time of the transaction and statements that you are investigating. That is what has been called circumstantial evidence.

You can only determine what a man knows by circumstantial evidence. You can convict a man upon circumstantial evidence just as you can convict a man on direct evidence. A man could come in here and say why he did things or why he didn't do them, but so far as you are concerned, you have got to depend upon circumstantial evidence as to what was in his mind.

Now, there is a rule regarding what is necessary concerning circumstantial evidence before you can convict. All circumstances have to be proven, and all of them must be consistent with the theory of guilt and every one of them must be inconsistent with any reasonable theory of innocence.

The defense in this case evidently relies upon the latter [113] requirement to compel you to return a verdict of not guilty in this case. That is their position, as I understand it, although they have not argued the case; that the business carried on by this firm and the transactions had with these men, and the way they came there, not being in a hurry, and all the other things they have brought out were all circumstances reasonably consistent with the theory of the defendant's innocence, and this is for you to determine. If you so find, then it will be necessary for you to acquit the defendants, but, if you find that these circumstances can only be consistent with the theory of the defendant's

knowledge, and all the other elements of the defense having been established to your satisfaction and beyond a reasonable doubt, it will be necessary to convict the defendant, or defendants, whose case you are considering.

These two witnesses who have admitted that they stole the goods are what is known as accomplices. The law permits the conviction of men on the testimony of accomplices, but it is the duty of the jury to carefully weigh and scrutinize the testimony of the accomplices, more so than in the case of other witnesses. One of the reasons for this is that, where an accomplice has been offered as a witness by the Government, there is a justifiable presumption that he expects some consideration at the hands of the Government. That such expectation is reasonably entertained by these two witnesses is shown by the fact that they have not yet been sentenced.

You understand that the question before you is not whether the manner in which the purchases were made by the defendants was such as would justify a verdict in a civil case against them for the goods, or whether the defendants were negligent in purchasing the goods or made a mistake, but, whether, when they engaged in this transaction, they purchased the goods knowing that they had been stolen. If you are convinced beyond a reasonable doubt that the particular defendant whose case you are considering at the time, did actually know at the time that he purchased or received them, that they were stolen, then, that defendant is [114] guilty; of course all the other elements of the offense

having been established to your satisfaction and beyond a reasonable doubt.

There is no presumption arising against a defendant, or any of them, by reason of his having been brought to trial before you. Every presumption of law is in favor of his innocence and this presumption remains with him throughout the trial and until the Government has introduced evidence sufficient to break it down; overcome it; and has proved beyond a reasonable doubt every material allegation in the indictment and has convinced you by the evidence beyond a reasonable doubt of his guilt.

As I told you before, if you have a reasonable doubt concerning the guilt of any defendant, he is entitled to the benefit of that doubt, and if you have a reasonable doubt as to whether or not the evidence has established the truth of every material allegation in any certain count of the indictment—the count you are considering at the time—he is entitled to the benefit of that doubt.

Reasonable doubt, as used in these instructions, means just what the two words mean. It is such a doubt as would cause a man of ordinary prudence, determination and intelligence to pause or hesitate in one of the more important transactions connected with his own affairs in every-day life. If you have such a doubt concerning any of the material elements and allegations of the charge, as to any defendant on either count, the defendant is entitled to the benefit of that doubt and to an acquittal. If you have no such doubt, then you do not have a reasonable doubt, and then it is your duty to convict.

You are, in this case, as in every other case where questions of fact are submitted to a jury for their determination, the sole and exclusive judges of every question of fact in the case, the credibility of the witnesses and the weight of the evidence. In determining the amount of credit to be accorded to the witnesses coming before you, you will be governed as you are in the ordinary affairs of life. [115]

The law does not undertake to enumerate or point out all the things that you should take into account in determining from the testimony where the truth lies in human transactions, but you should take into account the manner of the witnesses upon the stand, their demeanor, and whether they impressed you as being perfectly candid, fair and truthful, or whether they appeared the contrary. You will also take into account their apparent reluctance in giving their testimony, or whether they appeared to be too willing, running along and getting ahead of the story and telling things that nobody has asked them about; also you will take into account the testimony of each witness by itself, whether it appears reasonable and probable in the light of the circumstances, or whether it appears unreasonable and unlikely; whether it is corroborated by other evidence where you would expect it to be corroborated, if it were true, or whether it is contradicted by other evidence. Also you will take into account the situation in which each witness was placed, as enabling him to actually see and know the things about which he has testified, as one witness might be much more

favorably situated, as enabling him to know what took place than another, equally anxious to tell the truth. This would be particularly true regarding the question of knowledge of the goods having been stolen, whether the witness actually knew the facts or whether he should have known them, in view of the circumstances.

You will apply to the testimony of each defendant the same rule that you apply to the testimony of the other witnesses, including their natural interest in the result of the case.

Is there anything further before the jury retires?

Mr. WACHHORST.—We are satisfied.

Mr. McMILLAN.—The Government is satisfied.

The COURT.—The form of verdict that you will take into the jury-room reads as follows: “On the first count of the indictment, we find Joseph Rosenthal blank guilty; Maurice Rosenthal, blank guilty; and Arthur F. Fitch, blank guilty; and the same as to the second count. If you find a defendant guilty on either [116] count, that is, either defendant on either count, you will fill in the word “is” before the word “guilty”; and if you find a defendant not guilty on either count, you will write in the word “not” before the word “guilty” of that particular count for that particular defendant, and so on until the verdict is completed.

The Court will remain here until 5 o’clock, and after that, when the jury comes in, it will only be a matter of a few minutes for me to come here from the hotel.

You may retire.

Whereupon and at 4:37 P. M. the jury retired to to their jury-room in charge of the proper bailiffs, and the Court announced a recess until the jury had agreed upon a verdict.

The jury returned into court at 7:40 P. M.

The COURT.—Let the record show the jury are all present. Gentlemen, have you agreed upon your verdict?

FOREMAN DAVENPORT.—Your Honor, we have.

The COURT.—Please give me your verdict.

Gentlemen, listen to your verdict as it stands recorded: “We, the jury, in the above-entitled case, find as follows: On the first count of the indictment, Joseph Rosenthal, not guilty; Maurice Rosenthal, not guilty; Arthur Fitch, not guilty. On the second count of the indictment, Joseph Rosenthal is guilty; Maurice Rosenthal is not guilty; and Arthur Fitch, not guilty. Signed by Elyse E. Davenport, foreman.” Ladies and gentlemen of the jury, do you say, one and all, that is your verdict?

The JURY.—We do.

The COURT.—Gentlemen, is there anything further before the jury is discharged?

Mr. WACHHORST.—There is nothing further.

Mr. McMILLAN.—There is nothing for the Government.

The COURT.—Very well, the verdict will be received as the verdict in this case, and the jury is discharged from further consideration of the case.

Whereupon, the defendant moved to set aside the verdict and grant a new trial on the ground and for the reason of the insufficiency of the evidence to sustain the verdict and that said verdict was inconsistent with the testimony of the case and that there was not sufficient testimony to sustain the verdict, but the Court overruled such motion, to which ruling the defendant then and there duly excepted.

Thereupon the Court entered judgment upon the verdict and sentenced defendant to be imprisoned for the period of one year and one day in the United States Penitentiary at McNeil Island, State of Washington, to which ruling and judgment of the Court the defendant by his counsel then and there duly excepted.

This is to certify that the foregoing bill of exceptions tendered by the defendant is correct in every part and is hereby settled, allowed, signed and ordered filed and made a part of the record in this case, all within the time allowed by the statutes and by orders of the Court duly made extending said time.

Dated this 4th day of March, 1921.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed Mar. 9, 1921. W. B. Maling,
Clerk. By Thomas J. Franklin, Deputy Clerk.

Certificate of Clerk U. S. District Court to Transcript on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 118 pages, numbered from 1 to 118, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of the United States of America v. Joseph Rosenthal et al., numbered 586, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with praecipe (a copy of which is embodied in this transcript) and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error, is the sum of Fifty-eight Dollars and Forty Cents (\$58.40), and that the same has been paid to me by the attorney for plaintiff in error herein.

Annexed hereto is the original citation on writ of error (pages 122 and 123), and the original writ of error (pages 120 and 121), with the return of the said District Court to said writ of error attached thereto (page 121).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 29th day of March, 1921.

[Seal]

WALTER B. MALING,

Clerk.

By Thomas J. Franklin,

Deputy Clerk. [119]

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Joseph Rosenthal, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Joseph Rosenthal, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to

the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 20th day of January, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by:

WM. H. HUNT,
United States Circuit Judge. [120]

Receipt of a copy of the within writ of error is hereby acknowledge, this 21st day of January, A. D. 1921.

FRANK M. SILVA,
United States Attorney.
By R. B. McMILLAN,
Asst. U. S. Attorney.

Return to Writ of Error.

The answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within writ of error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, to

the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal] WALTER B. MALING,
Clerk U. S. District Court, Northern District of
California.

By Thomas J. Franklin,
Deputy Clerk.

[Endorsed]: No. 586. In the Northern Division of the United States District Court for the Northern District of California. Joseph Rosenthal, Plaintiff in Error. vs, United States of America, Defendant in Error. Writ of Error. Filed Jan 22, 1921. W. B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk. [121]

Citation on Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Northern Division, wherein Joseph Rosenthal is plaintiff in error, and you are defendant in error, to show

cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT, United States Circuit Judge for the Ninth Judicial Circuit, this 20th day of January, A. D. 1920.

WILLIAM H. HUNT,
United States Circuit Judge. [122]

Received a copy of the within citation, January, 20, 1921.

FRANK M. SILVA,
U. S. Attorney,
By R. B. McMILLAIN,
Asst. U. S. Atty.,
For the U. S. Attorney.

[Endorsed]: No. 586. In the Northern Division of the United States District Court, for the Northern District of California. Joseph Rosenthal, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 22, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [123]

[Endorsed]: No. 3669. United States Circuit Court of Appeals, for the Ninth Circuit. Joseph Rosenthal, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the

Northern Division of the United States District Court of the Northern District of California.

Filed March 29, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals, Ninth Circuit.

JOSEPH ROSENTHAL,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Order Extending Time to and Including April 1, 1921, of Return to Writs of Error.

Good cause appearing, therefore ORDERED that the return to each of the two writs of error, heretofore issued in the above action, is hereby extended to and including the first day of April, 1921.

WM. H. HUNT,
Circuit Judge.

Dated February 2d, 1921.

[Endorsed]: No. 3669. United States Circuit Court of Appeals, Ninth Circuit. Joseph Rosenthal, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time (Apr. 1, 1921) of Return to Writs of Error. Filed Feb. 3, 1921. F. D. Monckton, Clerk. Re-filed Mar. 29, 1921. F. D. Monckton, Clerk.

No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error.

FILED

APR 30 1921

F. D. MONCKTON,
CLERK.

No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statements of Case.

A. RECORD AND PROCEDURE.

Joseph Rosenthal was indicted jointly with Maurice Rosenthal and Arthur F. Fitch, on two counts, viz.: In count one it was alleged that on or about November 10, 1919, at Sacramento, within the jurisdiction of the district court, then and there being the defendants

“did then and there unlawfully, willfully, knowingly and feloniously *buy and receive thirty-nine* cases containing five thousand cigarettes each, of the value of \$1,462.50 in lawful money of the United States, and which said thirty-nine cases of cigarettes had theretofore

been unlawfully stolen, taken, and carried away from said railway car of the Southern Pacific, to-wit, car C. E. & I, 35132",

by M. H. Young and F. W. LaVeque; that the said thirty-nine cases of cigarettes at the time they were stolen, taken, and carried away

"constituted a part of a shipment of freight in Interstate Commerce over the lines of railroad of the said Southern Pacific Company",

and consigned by John Bollman & Company of San Francisco, California, to divers consignees, all residents of Portland, Oregon, concluding as follows:

"That at the time and place of aforesaid defendant then and there well knew that the said thirty-nine cases, containing five thousand cigarettes each had been, therefore, willfully stolen, taken and carried away from said railway car, as aforesaid" (Tr. p. 3).

The second count charges that said defendants on or about the 10th of November, 1919, did then and there unlawfully, willfully, knowingly and feloniously received and have in their possession, knowing the same to have been stolen from freight car of the Southern Pacific Company, to-wit: car C. E. & I, 35132, certain goods and chattels, to-wit: thirty-nine cases containing 5000 cigarettes each of the approximate value of \$1,462.50,

"which goods and chattels were then and there a part of the Interstate Shipment of freight over the lines of the railroad of said Southern Pacific Company, and were then and there in transportation over said line of railroad"

from John Bollman & Company of San Francisco, California, to various persons "all of Portland, Oregon, in Interstate Commerce" (Tr. p. 4).

A trial was had and a verdict rendered finding all three defendants not guilty on the first count of the indictment, and Maurice Rosenthal and Arthur F. Fitch not guilty in the second count but finding plaintiff in error guilty thereon (Tr. p. 7). Judgment was rendered and sentence imposed by the court upon the plaintiff in error under said verdict (Tr. p. 7). Motion for a new trial was made in his behalf which was overruled by the court (Tr. p. 9), and the record was sent up for review.

It is perhaps proper to say, that, upon the present attorneys being employed for plaintiff in error, an examination of the record of the case disclosed that a writ of error had already been issued upon the application of the then attorneys for plaintiff in error, but was based solely upon an assignment of error as to the refusal of the court to grant a new trial. The present attorneys for the plaintiff in error, within the time allowed by the statutes of the United States, applied for the issuance of a second writ based upon an assignment of error sufficient to warrant a consideration of the case by this court upon all points counsel desired to raise.

This practice was followed in accordance with the decision of the United States Circuit Court of Ap-

peals, Fourth Circuit, in the case of Gould v. United States, 205 Fed. 883.

Returns were made to both writs of error and the cases properly docketed in this court; the case on the first writ of error being No. 3638 and on the second No. 3669. By stipulation, approved by the Hon. Wm. H. Hunt, Circuit Judge, but one record was printed, viz.: that in No. 3669, and it was agreed that No. 3638 should not be argued but should abide the final disposition and No. 3669, the case now on hearing.

B. TESTIMONY.

At the trial of the case, after the government had introduced several witnesses as to the shipping of these cigarettes and as to the number delivered to the consignees, it was stipulated in open court that these particular 39 packages were shipped on car C. E. I 35132 over the lines of the Southern Pacific Company in Interstate Commerce; that the same were stolen or removed from this car somewhere between Roseville and Gerber, California, and that they were stolen on or about November, 1919, or October, 1919 (Tr. pp. 33 and 34).

The trial proceeded after the above admission, and disclosed the following facts:

Sometime in September W. H. Young and F. W. LaVeque, who were then employed by the Southern Pacific Railway Company, came into the store of the Pacific Sales Company at Sacramento, and

offered a large quantity of cigarettes for sale. These two men were acting under assumed names as follows: Witness Young under the name of McAllister and witness LaVeque under the name of Burke. They offered the cigarettes at \$6.00 per thousand, and the general manager in charge of the store would have nothing to do with them. They came around the next morning and offered them for \$5.00 per thousand, whereupon the manager telephoned to Maurice Rosenthal, owner and proprietor of the Pacific Sales Company Store, who advised the manager to purchase the cigarettes if everything appeared all right and to pay for them out of the cash register. Shortly thereafter these two men again appeared for the purpose of selling another lot of cigarettes; the manager again communicated with Mr. Maurice Rosenthal, who wrote a letter under date of October 1st to the manager, in which he said:

“We want to make sure that those cigarettes are not stolen and that the men have a title to the goods, as I do not desire to buy stolen goods no matter at what profit we can make on the same.”

“If you feel assured that the men have obtained these goods legitimately, telephone us and we will forward check for the amount, but if you have any doubt on the subject let him take his goods back as I do not want to get mixed up with any disreputable proposition.”

To this letter the following P. S. was added.

“If the party you purchased these cigarettes from is willing to sign an affidavit or even this

letter, that the goods have been purchased by him, and that there is nothing owing for the cigarettes, or in other words if he has a clear title to the same, have him sign this letter and return same to us."

At the bottom of this letter appears the following:

"I have a clear title to these cigarettes.
(Signed) F. W. Burke" (Tr. p. 63).

Witness LaVeque or Burke, as he was known in the store, signed this last statement and afterwards received a check for \$1040 for the cigarettes (Record 64).

The transcript further shows that other transactions were had between Burke and the Pacific Sales Company, and that the cigarettes so purchased were always delivered to the Pacific Sales Company at its store in Sacramento and paid for by the check of Maurice Rosenthal.

Along about October 30th, Young and LaVeque again called at the store and indicated that they had a large number of cigarettes for sale. They were notified that Mr. Joseph Rosenthal would be at Sacramento on the next day and to come in and see him about the matter. Joseph Rosenthal appeared the next morning and they met him and had a conversation relative to the cigarettes involved in this indictment. Joseph Rosenthal stated that he would have a written contract for the same drawn and they should come in sometime during that after-

noon and sign the same. Joseph Rosenthal then went to lunch, at which time he called up Maurice Rosenthal and had a conversation with him in which he was advised that if he believed the cigarettes were all right to enter into a contract which should provide for a division of the payments, as the amount would be something about \$11,000. Joseph Rosenthal dictated a contract before he returned to the store, thereafter Young signed the same (this contract appears in record at pages 57 and 58). It is dated October 31, 1919, and states as follows:

"I, F. W. Burke, residing at Gerber, California, citizen of California, United States of America, agree to sell to the Pacific Sales Company, located at 6th and L Streets, Sacramento, California, two and one-half millions of cigarettes composed of the following brands: Camels, Lucky Strike and Chesterfields. The price of the same to be \$4.50 per thousand. Delivery on same to be one-third on November 1st, 1919, and the balance within fifteen days. Terms and payments on same to be as follows: One-third payable December 1, 1919, one-third payable December 15, 1919, and one-third payable January 1, 1920.

"The seller F. W. Burke guarantees the cigarettes to be in first class salable condition. He also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any federal, state or local law or statutes, and gives to Pacific Sales Company a clear bill of sale to same with each delivery. In the event of F. W. Burke having a larger quantity of cigarettes than stated of the above brands he agrees to deliver and the Pacific Sales Company

to accept the same on the basis of four dollars and fifty cents (\$4.50) per thousand."

"F. W. Burke further agrees to deliver these cigarettes f. o. b. to the Pacific Sales Company at 6th and L Streets, Sacramento.

(Signed) F. W. Burke."

Endorsed on the contract we find the following language:

"I accept the above for the Pacific Sales Company.

(Signed) Joseph Rosenthal."

It must be remembered that only the cigarettes purchased and sold under this contract are involved in the indictment. All the other dealings between the Pacific Sales Company, and these two thieves were introduced in evidence evidently for the purpose of showing the prior transactions between the parties.

The testimony of Mr. Young in connection with the theft of the cigarettes involved in the indictment is somewhat interesting. He says that they were stolen from the cars from the Southern Pacific Train on the 8th of November, 1919, and delivered to the Pacific Sales Company on the 10th of that month, which shows conclusively that at the time the contract was made they had no cigarettes in their possession and expected to be able to steal the same in time to enable them to make the delivery as agreed in the contract (Tr. p. 41).

It conclusively appears from the testimony that all the cigarettes, both those dealt in prior to the

contract and afterwards under the contract, were delivered to the Pacific Sales Company at its store in Sacramento. We take it that there will be no controversy about this, and that it is unnecessary to further refer to the transcript to substantiate this assertion. It will be further noticed that Burke and McAllister did not try to conceal the delivery of any of these cigarettes; they appeared in the store openly, and awaited the payment of the money from Maurice Rosenthal, in each instance of the delivery. It would uselessly extend this brief beyond proper bounds to quote the testimony found in the record setting forth these facts.

When the contract was signed Mr. Young was present and objected to the terms of payment as specified therein. He insisted upon only two payments, and when this was suggested, he stated that he and Mr. Burke must be absolutely honest about this transaction, because they are willing to wait so long for the payment of the goods (Tr. p. 12).

It must be conceded by counsel for the government that the Pacific Sales Company was merely a trade name adopted by Maurice Rosenthal who was operating some eleven stores in different cities of California; that he was the sole owner of the business, and that Joseph Rosenthal was merely employed by him as purchasing agent, having no interest of any kind in the business. Mr. Maurice Rosenthal testified directly as to this as follows:

“His business is a wholesale furniture and general chain of stores; that the name of his business is Maurice Rosenthal, and that he does business under the name of the Pacific Sales Company and Sales Stores; that the Pacific Sales Company is owned by him as sole proprietor. He knows Joe Rosenthal, his son. Knows Mrs. Lewis, Mr. and Mrs. Fitch. They were all his employees” (Tr. p. 133).

No evidence of any kind contradictory to the above was offered by the government and its attorneys did not cross-examine Mr. Rosenthal relative to the above testimony.

The testimony further shows that it was the duty of Joseph Rosenthal (plaintiff in error) as purchasing agent for Maurice Rosenthal, to go to each of these eleven stores at least once every month for the purpose of determining what further stock had to be bought. 39 cases of the 42 shipped were delivered by Young and LeVeque at the Pacific Sales Company store, and Maurice Rosenthal paid to them several thousand dollars on the purchasing price thereof. The officials of the United States, found a copy of the above contract on the street in the town of Lincoln, Placer County, California. They arrested Young and LaVeque for the theft of these cigarettes. They were indicted and pleaded guilty, but a very significant circumstance appeared, viz.: they had not been sentenced at the time of this trial. In ordinary contemplation this would mean that the government had offered them some leniency at least, if they would testify fully at the trial of this action,

and it is presumed that the extent of such leniency would be measured somewhat by the character of the testimony they should give at the trial.

Joseph Rosenthal testified that he never had seen any of the cigarettes which were purchased and delivered under the contract (Tr. p. 132). He further testified that he believed all these cigarettes came through purchases by Young and LaVeque from the government; that he saw some of the cigarettes in the store at Sacramento, which had been purchased by the general manager thereof prior to same contract, and noticed that some of the packages were marked "*P I E R*" and "*W A S H*"; that he asked Mr. Burke or LaVeque, if these cigarettes were government cigarettes; that he don't remember the answer made to that question "but from the way I got it, I was under the impression at that time that they were out of the same lot" (Tr. p. 121). La Veque testified that Joseph Rosenthal was looking over the packages in the store one day and said: "Where did you get them, were they assigned to a steamship company in Seattle"? That Joseph Rosenthal figured that they were perhaps government cigarettes, but did not give Burke a chance to answer, and that Burke did not volunteer; that Rosenthal just happened to say something about a steamship company in Seattle and said he figured that they were government cigarettes (Record p. 60).

Specifications of Errors.

The court erred in giving and entering judgment on the verdict herein because:

(a) The second count of the indictment states no crime under the statutes of the United States. (Assignment of errors 1 (a).)

(b) Acquittal of all the defendants on the first count in the indictment was tantamount to their acquittal upon the second count. (Assignment of errors 1 (f).)

(c) There was no testimony sufficient to warrant defendant's conviction on the second count of said indictment. (Assignment of errors 2 (bcde).)

(d) There was no evidence introduced of plaintiff in error's guilt under said second count.

(e) The verdict is inconsistent and void. (Assignment of errors 1 (g).)

(f) All the evidence introduced at the trial was at least as consistent with the innocence of defendant as with his guilt. (Assignment of errors 1 (h).)

The court erred in refusing to grant the defendant a new trial because:

(a) The second count of the indictment states no crime under the statutes of the United States. (Assignment of errors 2 (a).)

(b) The acquittal of all the defendants on the first count of the indictment was tantamount to their acquittal on the second count thereof. (Assignment of errors 2 (f).)

(c) The record contains no testimony sufficient to warrant a conviction of defendant on the second count of said indictment. (Assignment of errors 2 (bcde).)

(d) There was no evidence introduced of plaintiff in error's guilt under said second count.

(e) The verdict is inconsistent and void. (Assignment of errors 2 (g).)

(f) All the evidence introduced at the trial is at least as consistent with the innocence of the defendant as with his guilt. (Assignment of errors 2 (h).)

Argument.

I.

ACQUITTAL ON FIRST COUNT TANTAMOUNT TO ACQUITTAL ON SECOND.

By the rendition of the verdict whereby the jury acquitted all of the defendants under the first count of the indictment, such verdict became tantamount to an acquittal of all defendants under the second count thereof, and, the court had no jurisdiction to enter a judgment against and impose a sentence upon plaintiff in error.

As above stated the indictment was returned under Section 7927, Barnes Federal Code, which provides that whoever "shall buy or receive or have in his possession" any goods and chattels described in the Act, *knowing them to be stolen*, shall be

guilty, and upon conviction be fined not more than \$500 or imprisoned not more than ten years or both.

These cigarettes were admitted to have been stolen from the Southern Pacific Railway by these two men, Young and LeVeque, who were then employed by that company (Tr. pp. 55-54). It must be remembered that the indictment confined itself in the first count to the charge that defendants *bought and received* the cigarettes *knowing them to be stolen* from an Interstate Shipment. The elements of the crime charged therefore were four in number, viz.: First, that the said defendants bought said cigarettes. Second, that they received the same. Third, that they had been stolen, and Fourth, that defendants had knowledge of such theft.

In order that the government might convict defendants or either of them under the first count of the indictment, all of the above elements of the crime must be found beyond a reasonable doubt. The jury refused to find either of the defendants guilty under the first count. We must therefore start with the proposition, that under this verdict the defendants were not guilty of: First, buying the cigarettes knowing them to have been stolen. Second, receiving the same, knowing them to have been stolen. The testimony was conclusive on the proposition that these cigarettes were bought by Joseph Rosenthal, acting in behalf of the Pacific Sales Company (Tr. pp. 11-6-133). Second, that the same were received by the general manager of the Pacific Sales Company (Tr. (Young) pp. 39-41; (LaVeque) pp. 57-58,

and (Contract) pp. 57-58). Therefore, the verdict of the jury on the first count can only be sustained upon consideration that the jury found that none of the defendants knew that the cigarettes had been stolen.

The crime attempted to be charged under the second count of the indictment relates to the same cigarettes as mentioned in the first count, and the same transaction is involved therein as in the first. If none of the defendants knew the cigarettes had been stolen none of them could be convicted under either count of the indictment.

Again briefly rehearsing the testimony: That of Mr. Young (Tr. pp. 34-35) and LaVeque (Tr. pp. 54-73), witnesses for the government, discloses that for two months prior to the transaction upon which the indictment was based, they had been selling stolen cigarettes to the Pacific Sales Company, all of which were paid for either in cash by said company or by checks of Maurice Rosenthal, the owner of said company.

About the last of October, 1919, these men came to the store of the Pacific Sales Company to dispose of another large quantity of cigarettes. They were informed by those in charge of the store that Mr. Joseph Rosenthal (plaintiff in error) would be in Sacramento the next day. They saw him the next day and LaVeque entered into a contract to sell to the Pacific Sales Company about two and one-half millions of cigarettes at \$4.50 per thousand.

Joseph Rosenthal is conceded to have had no interest in the Pacific Sales Company. He was merely an employee of Maurice Rosenthal the sole owner and proprietor of said company. It is also conceded that Joseph Rosenthal was the purchasing agent for Maurice Rosenthal. All the cigarettes in question were delivered to the Pacific Sales Company, according to contract, at its store in Sacramento, and whatever money was paid to Young and LaVeque was the money of Maurice Rosenthal. This seems to be conceded by counsel for the government.

The jury, as we have demonstrated, found by their verdict that none of the defendants knew these cigarettes had been stolen at the time they were bought and received. This being true how was it possible for the jury to conclude as they did that Joseph Rosenthal knew they had been stolen when they were received and passed into his possession (we shall contend later that they never were delivered to Joseph Rosenthal and never passed into his possession). These two findings are not only inconsistent with but diametrically opposed to each other. If none of the defendants knew the cigarettes were stolen when the same were bought and received, as charged in the first count, such want of knowledge conclusively prevails as to the allegation of the second count.

As a matter of fact the jury must have been, unconsciously perhaps, very careless to say the least, or they would not have rendered such a verdict. By their verdict they found that none of the defendants

knew these cigarettes were stolen at the time they were purchased (October 31), and at the time they were received (about November 10th), and yet they found that Joseph Rosenthal knew they were stolen at the time of delivery and the receipt of their possession. It would be impossible for the jury to have found him guilty under the second count, had they paid the slightest attention to the evidence introduced before them. There is absolutely no testimony even tending to show that any of these cigarettes were ever received by him and no testimony even tending to show that he ever had the same in his possession. By the contract of purchase the cigarettes were to be delivered to the Pacific Sales Company. They were so delivered. He never saw any of them, according to the uncontradictory testimony, until after the government officials took possession of them. All this in addition to the fact that the jury had found by their verdict as to the first count that none of the defendants knew the goods were stolen when they were purchased and received.

Joseph Rosenthal was not interested in the Pacific Sales Company but was a mere employee of Maurice Rosenthal, the owner and proprietor of said company; therefore, it cannot be argued that a delivery to and receipt of possession by the Pacific Sales Company, was a delivery to and receipt of possession by Joseph Rosenthal. As a matter of fact the jury, after acquitting all of the defendants on the first count, probably felt that some one should be made the "goat" in the transaction and thus, carelessly,

without considering the effect of their verdict on the first count, and with no consideration of the evidence as detailed above, concluded that, inasmuch as he was the "youngest man of the crowd", he would suffer less by conviction than any of the others. They seemed to forget that by this verdict they cast a cloud upon the character of this young man which never could be removed, if the verdict was enforced. We cannot avoid saying that probably the verdict came about through the fact that the then attorneys for the defendants paid very little attention to the case and did not do their duty, when they refused to argue the same to the jury. If any argument had been made, calling attention to the fact that he was the least guilty of all the defendants, and that none of the cigarettes were ever received by him or came into his possession, the jury would undoubtedly have hesitated and upon a proper consideration of all the evidence, would have acquitted him on both counts.

The case of *Edwards v. United States* (266 Fed. 848), clearly illustrates our position on this point.

Edwards was indicted on three counts, viz.: .
 1. With stealing six bales of hay belonging to the government. 2. With stealing six bales of hay which has theretofore been furnished for military services, and 3. With applying to his own use property of the United States heretofore furnished for military service.

A verdict was rendered of not guilty on the first and second counts and guilty on the third.

While the court reversed the case because the third count was insufficient in that the property was not sufficiently described therein it says:

“This verdict to say the least was contradictory and inconsistent.”

Judge Knapp filed a concurring opinion in which he says:

“When Edwards went to take the hay he either believed it had been abandoned or he did not so believe. If it had been abandoned, the taking was innocent and he was not guilty of stealing it or of ‘knowingly’ applying it to his own use. If he did not believe the hay had been abandoned the taking was felonious and he was guilty of stealing it. The finding of the jury that he was not guilty of stealing it was therefore in effect a finding that he believed the hay had been abandoned and this left no basis for the charge of applying it to his own use. To ‘knowingly’ apply it to his own use implies that the property was either stolen or entrusted to defendant, manifestly the hay was not entrusted to him nor did it come rightfully into his possession except on the theory that he believed it had been abandoned. The jury found that he did not steal it and it follows that he did not commit the offense of which he was convicted.”

II.

WANT OF ANY EVIDENCE TO SUSTAIN VERDICT AGAINST JOSEPH ROSENTHAL.

In approaching the discussion of this point, we first desire to call the court’s attention to a distinguishing characteristic between our position and that involved where the *sufficiency* of the evidence

is in question. We insist that the record contains *no evidence* in anyway showing or even tending to show that plaintiff in error was guilty of the crime of which he was convicted. No question is here involved concerning the *weight* of evidence but only that there is no evidence. The determination by this court that the evidence is insufficient, ordinarily raises a question of the weight to be given to the evidence by the respective parties; that is a question of fact. Where the point is made that the record contains *no evidence*, there is nothing to weigh and the question becomes one entirely of law.

Isbell v. United States, 227 Fed. 788, and cases.

If the record contains no evidence of the commission of the crime charged in the second count of the indictment, there was nothing for the jury to consider or pass upon and consequently the verdict must be vacated. To illustrate: Suppose an indictment charging murder in the first degree; and suppose the record contains no evidence of the *corpus delicti*. As a matter of law a verdict of guilty should and would be set aside at once whenever the attention of the court was called to the condition of the record. If one is convicted of a crime without evidence to support the conviction, it would be a reproach to the law to incarcerate the defendant.

III.

**INSUFFICIENCY OF SUBSTANTIAL EVIDENCE TO SUPPORT
THE VERDICT.**

We are aware of the rule of this court and other United States courts of appeal that in order to properly raise the question of insufficient or want of evidence to support a judgment, a motion must be made at the close of the testimony introduced in behalf of the plaintiff, and a renewal thereof at the close of the case, and an exception to the ruling of the court be entered, and that unless the question is thus properly raised on the record, an appellate court will not consider the same. The record herein contains no such motions or exceptions. We insist, however, that the rule above announced has no application to the case at bar under the circumstances disclosed by the record.

The indictment was against three defendants, Maurice Rosenthal, Joseph Rosenthal and Arthur F. Fitch, jointly, and above stated, consisted of two counts: First, the buying and receiving of the cigarettes in question knowing them to have been stolen, and second, receiving and having the cigarettes in their possession knowing them to have been stolen.

The evidence that Joseph Rosenthal, plaintiff in error, bought the cigarettes in question as purchasing agent for the Pacific Sales Company, which Maurice Rosenthal alone owned, and that same were delivered at the store of that company; that Fitch, the general manager of that company, received the same in behalf of the company, and that they were,

after such delivery, always in possession of such company, seems to be conclusive. It appears that Maurice Rosenthal made payments on them in accordance with the contract executed in behalf of the Pacific Sales Company by plaintiff in error as purchasing agent, until he was informed that they had been stolen. It therefore appears from the record that there was evidence introduced by the government at least tending to establish the charges in the first count, which, if, unexplained, might have been sufficient to sustain a conviction of each and all said defendants under the same. Therefore no motion to direct a verdict for want or insufficient evidence could possibly have been sustained at the close of plaintiff's testimony.

By the uncontradicted testimony introduced in behalf of the defendants it was disclosed that the Pacific Sales Company was a mere trade name and that its business and property was owned and conducted solely by Maurice Rosenthal, who made all payments on the cigarettes in question; that plaintiff in error was simply an employee of Maurice Rosenthal, viz: purchasing agent; that Fitch was merely the general manager for him in the store at Sacramento; that neither plaintiff in error or Fitch had any interest in the business, but both were simply employees of Maurice Rosenthal. The transcript contains not one word of testimony in any way contradicting the above. Counsel for the government treated this testimony of Maurice Rosenthal as conclusive. They not only introduced no

testimony in any way tending to contradict it, but did not cross-examine the witnesses in relation to the same. That it is true, therefore, must be conceded, and it must further be conceded that the jury accepted it as true.

No motion was made at the close of the case to acquit the defendants because of insufficiency or want of evidence. The defendants were acting for each and all of the defendants, and presumably they fully realized that in so far as Maurice Rosenthal was concerned, there was evidence sufficient to go to the jury on both counts of the indictment, and feared the effect upon this case of a motion of that kind being made in behalf of plaintiff in error or Mr. Fitch.

It is very apparent from the record that this case was not carefully or closely tried by the attorneys for the defendants. It seems that they felt sure of an acquittal and made no effort to protect their clients should the result be to the contrary. This is apparent from the fact that they refused to argue the case to the jury and announced themselves satisfied with the charge of the court. Unfortunately their confidence in an acquittal was badly shattered by the verdict, which found plaintiff in error guilty on the second count of the indictment.

It would seem harsh treatment to hold that because of the carelessness and negligence of his attorneys in not properly raising the question of the

insufficiency or want of evidence, that plaintiff in error should forever be branded as a criminal and be incarcerated in the penitentiary.

But there is an exception to the rule above announced which must be enforced with the same strength and vigor as the rule itself. It is established by the Supreme Court of the United States and various federal appellate courts that, where a criminal case comes up for review, in which the life or liberty of a person is involved, the court will consider errors, even without the suggestion of counsel and without any exception being shown in the record, or bills of exception, or assignments of error. This exception was first announced and applied by the Supreme Court of the United States in the case of *Wiborg v. United States*, 163 U. S. 632, as follows:

“No motion or request was made that the jury be instructed to find for defendants or either of them. When an exception to a denial of such motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency, and although this question was not properly raised, yet if a plain error was committed in a matter so vital to defendant, we feel ourselves at liberty to correct it.”

The Supreme Court has since that decision followed the rule there laid down.

Hains v. United States, 182 U. S. 485, and other cases.

This rule and exception has probably received more special attention in the federal courts of appeal than in the Supreme Court. For instance in *Ayala v. United States* (268 Fed. 296), in which the defendant made a motion to dismiss the case because of lack of evidence at the conclusion of the government's case. He then introduced testimony only of his good character, and did not renew his motion after the close of the evidence.

The court says:

“The general rule is that, if the defendant after the denial of his motion to direct a verdict at the close of the government's testimony, introduces testimony in his own behalf, he thereby waives his motion, and it is his duty to again renew his motion after all the evidence is closed. But notwithstanding this rule, the Supreme Court has held that where a plain error has been committed in the trial of a criminal case, it will be considered by the court, although a motion for a directed verdict has never been made.”

In the case of *Sykes v. United States* (204 Fed. 909) the court says:

“Where the life or personal liberty of the accused is at stake, the courts of appeal may notice such a grave error as the absence of substantial evidence to sustain the conviction where the question was not properly raised in the trial court.”

And again in the same case the court further says:

“The defendant in this case must not be unlawfully deprived of his liberty for five years

without proof of his guilt beyond a reasonable doubt, much less without any substantial evidence of it, and this court sit in silence and perpetuate such injustice.”

In *McNutt v. United States* (267 Fed. 670) the defendant was arrested for carrying on the business of a retail liquor dealer without having paid his license tax. When the case was called he appeared and pleaded not guilty. The court asked him if he wanted an attorney and he said that he did not. He made no objections to any of the proceedings or testimony introduced, but testified that he did not sell any whisky, because it was all taken away from him. After conviction he employed an attorney who prepared an assignment of error, sued out a writ of error, furnished a brief and argued his case for him. The United States attorney urged, because there were no objections or exceptions to any of the evidence or to any of the rulings of the court at the trial, there was nothing to review, and asked that judgment be affirmed.

The court says:

“Such is undoubtedly the general rule, but there is an exception to it as firmly established as the rule itself. It is that in criminal cases, where the life or liberty of the citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical error which appears to have seriously prejudiced the rights of the defendant, although the questions they present were not properly raised or preserved by objections, exceptions, request, or assignment of error.”

In *Fielden v. United States* (227 Fed. 862) the court says:

“It is the general rule of the Supreme Court and of this court, that the appellate court does not consider the question whether or not there was substantial evidence to sustain the verdict in the absence of a motion or request for an instructed verdict by the defeated party at the close of the trial, and an exception to its denial. There was no such motion, request or exception in this case, and counsel for the government object to a consideration of the evidence and invoke this rule. There is, however, an exception to the rule to the effect that in a criminal case, where the life or liberty of the citizen is at stake, the appellate court may, in the interest of justice, examine the evidence to see whether there was any substantial evidence whatever against the accused, and if none is found, may reverse the judgment, although no motion or request was made on that ground, and no exception was taken or assignment of error made.”

See also

Moore v. United States (224 Fed. 95);

Bandy v. United States (224 Fed. 98);

Taylor v. United States (219 Fed. 670).

We insist that the instant case is one to which the above exception should be applied. Here a young man, under the age of 24 years, stands branded as a criminal, and has been sentenced to incarceration in the federal penitentiary for a year and a day, upon the verdict of a jury; the record is not only barren of any evidence even tending to show that he was guilty of the crime charged, but

presents uncontradicted evidence that, in all his doings with reference to the crime charged, he acted only as an employee, never receiving or having had in his possession any of the cigarettes. In fact he never saw any of them until they were seized by the government officials.

IV.

THE VERDICT WAS INCONSISTENT AND CONTRADICTORY.

The verdict finds that plaintiff in error *did not know* that the cigarettes had been stolen at the time they were bought and received. It also finds that plaintiff in error *did know* that such cigarettes had been stolen at the time they were received and passed into his possession. These findings were made upon the same identical evidence.

A finding that plaintiff in error knew that the cigarettes had been stolen was necessary to convict him under either count. The trial was had on both counts and the jury found upon a consideration of all the testimony, both that plaintiff in error *knew* and *did not know* that they had been stolen.

The findings are diametrically opposed to each other and effect cannot be given to both. It seems unnecessary to quote authorities on this proposition, as it is "Hornbook" law, that is, an inconsistent and contradictory verdict cannot stand.

We refer, in this connection, to point one of this brief, where the matter here involved is quite fully discussed.

V.

THE EVIDENCE DISCLOSES THAT IT IS AT LEAST AS CONSISTENT WITH INNOCENCE AS WITH GUILT.

Under such circumstances the same is insufficient to sustain a verdict.

Isbell v. United States (227 Fed. 788);
Chambers v. United States (237 Fed. 513);
Clyatt v. United States (197 Fed. 207);
Scroggin v. United States (255 Fed. 285);
Tucker v. United States (224 Fed. 833);
Harrison v. United States (200 Fed. 662);
Union Pacific Coal Co. v. United States (173 Fed. 737).

We submit that the judgment should be reversed and the court below directed to discharge plaintiff in error.

We feel that a great injustice has been done our client. It appears clearly from the record that he was not defended with the aggression and care to which he was entitled. At the time of the transaction for which he was indicted, he had not reached the age of 23 years. He occupied a very responsible position—that of purchasing agent for eleven stores belonging to his father—and doubtless he was ambitious in his efforts to make his employment successful, yet he was very careful with reference to this particular transaction. With full knowledge of all the purchases of cigarettes theretofore made by the manager of the store from these two thieves, he did not close the deal in question until he had communicated with his father in San Francisco.

We have directed the attention of the court to the fact that the record contains no evidence even tending to show that our client ever received or had any of the cigarettes in his possession, and that the jury found both ways on the question of his knowledge; that they were stolen.

A careful examination of the record discloses that our client was the least guilty of the three defendants indicted. Maurice Rosenthal owned the entire business of the Pacific Sales Company. His manager received and had in his possession for Maurice Rosenthal and with his knowledge, all the goods in question, yet Maurice Rosenthal and Mr. Fitch were found not guilty on both counts of the indictment while our client who was a mere employee of Maurice Rosenthal and who only purchased the cigarettes after communicating with his father, and who never received any of them or had them in his possession, is found guilty and sentenced to one year and one day in the penitentiary.

Dated, San Francisco,

April 25, 1921.

JOSEPH E. BIEN,

JNO. B. CLAYBERG,

Attorneys for Plaintiff in Error.

No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

FRANK M. SILVA,

United States Attorney,

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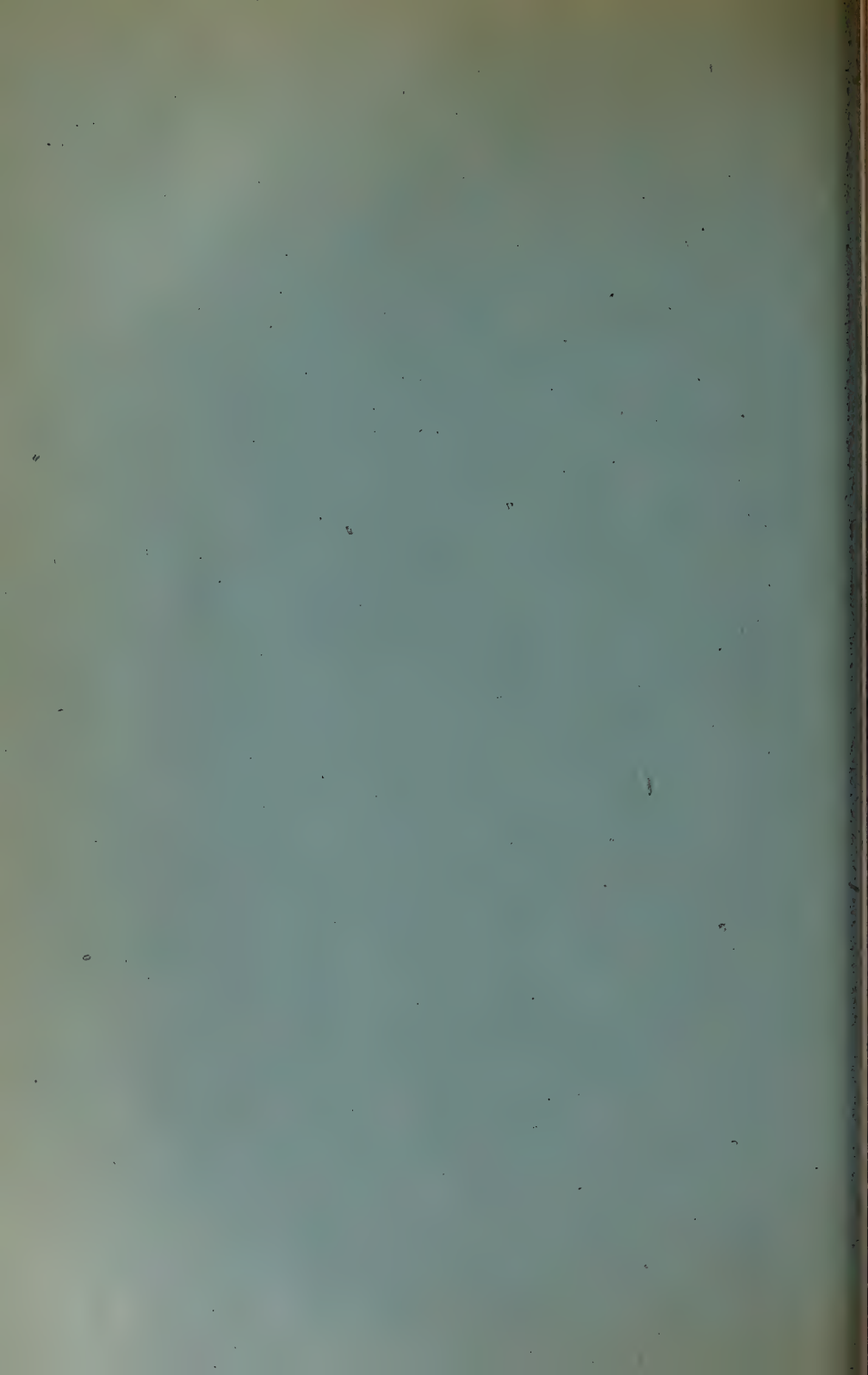
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FILED

JUL 28 1927



No. 3669

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

STATEMENT OF FACTS.

The plaintiff in error, Joseph Rosenthal, was indicted jointly with Maurice Rosenthal and Arthur F. Fitch in two counts, for violating the terms of the Act of February 13, 1913. The first count, in substance, charged that the defendants

“did then and there unlawfully, wilfully, knowingly and feloniously buy and receive thirty-nine cases containing five thousand cigarettes each, which said thirty-nine cases of cigarettes were of the approximate value of \$1462.50, in lawful money of the United States, and which said thirty-nine cases of cigarettes had theretofore been unlawfully stolen, taken and carried away from a certain railroad car of the Southern Pacific Company, to wit, Car C. E. & I. 35132, by M. H. Young and F. W. La Veque,

the said thirty-nine cases of cigarettes, at the time they were stolen, taken and carried away, constituting a part of a shipment of freight in interstate commerce over the lines of railroad of the said Southern Pacific Company, and consigned by John Bollman and Company of San Francisco, California, to Coast Cigar Company, Lang and Company, Park Cigar Company, and T. W. Jenkins, all of Portland, Oregon; that at the time and place aforesaid the said defendants then and there well knew that the said thirty-nine cases containing five thousand cigarettes each had been theretofore stolen, taken and carried away from said railroad car, as aforesaid."

The second count of the indictment is substantially the same as the first, except that instead of it being charged that the defendants did "feloniously buy and receive" the said cigarettes, it is charged that they did "feloniously receive and have in their possession, knowing the same to have been stolen", the said cigarettes.

All the defendants were acquitted on the first count, and on the second count Joseph Rosenthal, the plaintiff in error, alone was found guilty.

The plaintiff in error, in his brief, has raised five points why the judgment of the Court below should be reversed. The contentions are as follows:

1st: That the acquittal on the first count of the indictment is tantamount to an acquittal on the second.

2nd: That there is want of any evidence to sustain a verdict against Joseph Rosenthal.

3rd: That the evidence is insufficient to sustain the verdict.

4th: That the verdict was inconsistent and contradictory.

5th: That the evidence discloses that it is at least as consistent with innocence as with guilt.

In reply to these contentions we will discuss the first and fourth contentions together, in view of the fact that they rest upon the same argument. We will likewise discuss the second, third and fifth contentions together, for the reason that they involve a discussion of the same evidence.

ARGUMENT.

I.

THE ACQUITTAL OF THE PLAINTIFF IN ERROR UPON THE FIRST COUNT IS NOT TANTAMOUNT TO AN ACQUITTAL ON THE SECOND COUNT.

It is well established that two offenses may be committed in the same transaction, and that the acquittal of either one of the offenses does not relieve the defendant from punishment under the other offense.

Morgan v. Devine, 237 U. S., at 632;
59 L. Ed., 1054.

The Act of February 13, 1913, makes the purchase of stolen goods, with knowledge that they are stolen, one offense, and the receipt or possession of the same goods known to have been stolen separate offenses, distinct from the offense committed by the purchase of the same goods.

U. S. v. Sullivan, 250 Fed. Rep., at 632.

The argument of the plaintiff in error that the acquittal on the first count of purchasing the goods was tantamount to an acquittal of him on the second

count, is based upon the assumption that an acquittal on the first count is a determination that none of the necessary elements existed to prove the crime charged. The acquittal on the first count is not a determination that none of the necessary elements existed to prove the crime, but merely that all of them were not proved. There is an acquittal only of the charge that the plaintiff in error both purchased and received the goods, but there is no acquittal of the charge that he received or had in his possession the goods. The jury could well find that the plaintiff in error received or had in his possession the stolen cigarettes, knowing them to have been stolen, and yet refused to believe that he had purchased and received the stolen cigarettes knowing them to have been stolen. The facts in the case at bar indicate that the jury was justified in reaching their verdict. The record shows that the purchase of the cigarettes was never completed, but that Joseph Rosenthal contracted to purchase two and one-half million cigarettes, and that thirty-nine cases of five thousand each were delivered and never paid for. Transcript, page 60, page 95.

While the purchase of the cigarettes was never completed, yet the record does show, beyond any question, that Joseph Rosenthal, the plaintiff in error, was the General Sales Manager and also the Purchasing Agent of the Pacific Sales Company, and as such officer contracted to purchase the cigarettes, fixed the time and the place of delivery, and the thirty-nine cases of cigarettes, with whose receipt and possession he is charged, were delivered at the time and place indicated by the terms of the contract entered into and signed by him. Transcript 116, pages 57-58; page 95.

II.

**THERE IS AN ABUNDANCE OF EVIDENCE TO SUSTAIN THE
VERDICT OF THE JURY.**

The contention of the plaintiff in error is that he did not know the cigarettes were stolen, and that he was merely an employe of Maurice Rosenthal, the owner and proprietor of the Pacific Sales Company, in whose behalf the cigarettes in the case at bar were purchased, and that as such employe he could not be deemed to have received or had in his possession the cigarettes. This is probably based upon a misapprehension as to the facts in the record. The testimony of Joseph Rosenthal himself is that he not only was the Purchasing Agent for the Pacific Sales Company, but that he also was the General Sales Manager of his father's firm. Transcript, page 16. An inspection of the record discloses that Joseph Rosenthal was the person who drafted the contract of purchase, who fixed the terms of the contract, who prescribed the time and place of delivery, who fixed the price to be paid, and who finally affixed his signature to the contract and bound the Pacific Sales Company. Transcript, pages 57-58-59-60-127-128-129-37 and 56. He must have been more than a mere employe if he had power to bind the company by his signature.

Joseph Rosenthal, at the time he entered into this contract of purchase must have known that the cigarettes that he was contracting to purchase were stolen goods, for we find in the contract itself this provision, dictated and inserted in there by the plaintiff in error.

“The seller, F. W. Burke, guarantees the cigarettes to be in first-class salable condition, *also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any Federal, state or local law or statute* and gives to the Pacific Sales Company a clear Bill of Sale to the same with each delivery.”

Not only did Joseph Rosenthal know at that time that the goods he was purchasing were stolen, but the record also shows that his father, Maurice Rosenthal, whom he was constantly consulting, had knowledge that goods purchased from the same parties that Joseph Rosenthal was dealing with were stolen, for we find him addressing a communication to the Pacific Sales Company at Sacramento containing the following advice:

“I am in receipt of yours of September 30th, but before sending you a check for \$1040 for these cigarettes which you purchased, we want to make sure that those cigarettes are not stolen, and that the man is entitled to those goods, as I do not want to buy stolen goods, no matter what profit we can make on same.” Transcript, page 63.

The next paragraph of same letter shows that he was perfectly willing to wink at the origin of the goods if necessary.

“P. S.—If the party you purchased these cigarettes from is willing to sign an affidavit or even this letter that the goods have been purchased by him and that there is nothing owing for the cigarettes, or in other words, if he has a clear title to same, have him sign this letter and return same to us.” Transcript, page 63.

The record shows that in spite of the fact that the plaintiff in error thus had knowledge that the goods he was purchasing were stolen, he made no effort

to investigate the character of the men he was dealing with, the origin of the goods he was purchasing, or require any references of the sellers. His only effort in this regard was to ask Mr. La Veque on one occasion whether the cigarettes were Government goods, and on this occasion he did not give Mr. La Veque, as he admits (Transcript 121) an opportunity to answer his inquiry, but made the remark that he thought the cigarettes were Government goods "but it didn't make any difference at this price." Transcript, page 69, page 70.

It must be borne in mind that the men the plaintiff in error was dealing with were two roughly dressed railroad laborers, who had no established business, and from their appearance one could easily surmise that they could not have been the lawful possessors of so large a quantity of cigarettes as two and one-half million. Transcript, page 36, page 55.

Not only was plaintiff in error purchasing the cigarettes from two unknown laborers, but he was purchasing them at a ridiculously low price, approximately one-half the wholesale market price for such cigarettes. Transcript pages 28, 41.

In spite of the fact that the contract provided for the purchase of a great number, namely, two and one-half million cigarettes, and for the furnishing of a Bill of Sale upon each delivery, still the plaintiff in error made no effort to procure any bills of sale or to exact any guarantee or request any reference from the parties with whom he was contracting. Transcript, page 127.

The Honorable Judge William C. Van Fleet, of the District Court for the Northern District of California, while a Justice upon the Supreme Court of the State of California, rendered a decision which is

quite applicable to the facts as disclosed by the record in the case at bar,

People v. Clausen, 120 Cal., at 381:

“Whether the defendant knew that the goods were stolen is to be determined by all the facts of the case. It is not necessary that he should have heard the facts from eyewitnesses. He is required to use the circumspection usual with persons taking goods by private purchase; and this is eminently the case with dealers buying at greatly depreciated rates. That which a man in the defendant’s position ought to have suspected he must be regarded as having suspected, as far as was necessary to put him on guard and on his inquiries. The proof in any case is to be inferential, and among the inferences prominent are inadequacy of price, irresponsibility of vendor or depositor.”

The record shows that the evidence is anything but consistent with the innocence of the plaintiff in error.

We respectfully submit that the judgment of the District Court should be affirmed.

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ROBERT B. McMILLAN,

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WILFORD H. TULLY,

Asst. United States Attorney,

Attorneys for Defendant in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

JOSEPH E. BIEN,

Attorney for Plaintiff in Error.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

The statement of the case is fully set forth in the Opening Brief for Plaintiff in Error.

Argument.

I.

THE ACQUITTAL OF THE PLAINTIFF IN ERROR UPON THE FIRST COUNT IS TANTAMOUNT TO AN ACQUITTAL ON THE SECOND COUNT.

There is no fault to be found with the statement of the United States Attorney that it is well established that two offenses may be committed in the same

transaction and that the acquittal of either one of these offenses does not relieve the defendant from punishment for the other offense; and cases cited upon this statement are correct exposition of the law.

There can be no question, however, as stated in the Opening Brief for Plaintiff in Error, that the Jury must have found by their verdict that none of the defendants *knew these cigarettes had been stolen* at the time they were bought and received. This being true, how was it possible upon the evidence for the Jury to conclude that Plaintiff in Error, Joseph Rosenthal, *knew that they had been stolen* when they were received and passed into the possession of defendant Fitch?

The statute (Act of February 13, 1913, ch. 50) defines the crime. It is "buying, receiving or having in possession" stolen property, with knowledge of its stolen character.

Any one of these acts, buying or receiving or having in possession, constitutes the crime, and all three together can charge no more.

Plaintiff in Error having been acquitted on the first count of buying and receiving, was necessarily acquitted of "receiving". Acquitted of receiving the property, he could not be held on the second count of "receiving and having in his possession", for he could not have had it in his possession if he did not receive it.

It will be remembered that the only connection that Joseph Rosenthal had with the transaction was the taking of the bill of sale on the 31st of October, 1919. After that bill of sale was taken, Joseph Rosenthal left Sacramento and had nothing further to do with, or knowledge of, the transaction.

The testimony shows beyond question and without dispute that the cigarettes were delivered to Fitch at Sacramento. Joseph Rosenthal was not present; he knew nothing of the delivery; he never saw the goods after they were delivered and the only knowledge that he is shown to have had that they were delivered is when they were produced in the Court-room on the trial of the case. It is shown that even then he did not know anything of the goods until the United States Attorney told him that they were the cigarettes which had been recovered from the store at Sacramento.

It appears without dispute that the cigarettes were stolen on the 7th of November—eight days after the Plaintiff in Error made the contract of purchase. Necessarily, it must follow that he could not know that the goods were stolen on the day of the contract of purchase for they were not stolen until afterwards. This, taken in connection with the fact that the Jury found him not guilty of purchasing and receiving the goods, shows he could not have received the goods and had them in his possession, knowing them to have been stolen. The verdict was contradictory and inconsistent.

Edwards v. United States, 266 Federal 848.

II.

THERE IS NO EVIDENCE TO SUSTAIN THE VERDICT OF THE JURY.

The Pacific Sales Company is not a corporation, an association of persons, or a partnership. It is nothing but a trade-name used by Maurice Rosenthal (one of the acquitted defendants) in the conducting of the business, he being the sole proprietor. The evidence affirmatively shows this without dispute. Arthur Fitch (the other of the acquitted defendants) was an employee of Maurice Rosenthal, acting only as manager of the Sacramento store. The Plaintiff in Error, Joseph Rosenthal, was also an employee of Maurice Rosenthal, acting as general sales manager in purchases and sales.

The United States Attorney in his brief makes the statement—

“He (Joseph Rosenthal) must have been more than a mere employee if he had power to bind the company by his signature”.

This statement, however, takes it for granted that Joseph Rosenthal did bind the company by his signature, concerning which there is no evidence. The testimony shows that Joseph Rosenthal had no right to make the contract on behalf of his father, Maurice Rosenthal, doing business under the name of Pacific Sales Company, until he was first specially authorized so to do. The testimony shows that before making the contract he called his father on the telephone and obtained such authority. There

is no testimony to show that there was a "company". The sole principal in the whole transaction was Maurice Rosenthal.

Again, the United States Attorney states—

"Joseph Rosenthal, at the time he entered into this contract to purchase, must have known that the cigarettes that he was contracting to purchase were stolen goods, for we find in the contract itself this provision, dictated and inserted in there by the Plaintiff in Error * * * * 'Also guarantees that these cigarettes were not obtained in any illegal manner or in violation of any Federal, State or local law or statute.' "

The answer to this statement is that Joseph Rosenthal, at the time he entered into this contract to purchase, October 31st, could not have known that the cigarettes he was contracting to purchase were stolen, for the reason that the thieves did not steal them until November 7th—eight days after the contract was made. Upon what theory the United States Attorney contends that the guarantee contained in the contract of purchase that the cigarettes were not obtained in any illegal manner or in violation of any law, is proof that Joseph Rosenthal knew the cigarettes were stolen, does not appear; and the answer to this statement is that the Jury did not so believe, because they found the Plaintiff in Error, Joseph Rosenthal, not guilty of receiving and purchasing the cigarettes knowing them to have been stolen.

The United States Attorney makes the further statement—

“Not only did Joseph Rosenthal know at that time that the goods he was purchasing were stolen, but the record also shows that his father, Maurice Rosenthal, whom he was constantly consulting, had knowledge that goods purchased from the same parties that Joseph Rosenthal was dealing with were stolen, for we find him addressing a communication to the Pacific Sales Company at Sacramento, containing the following advice: ‘I am in receipt of yours of September 30th, but before sending you a check for \$1040 for those cigarettes which you purchased, we want to make sure that those cigarettes are not stolen and that the man is entitled to those goods, as I do not want to buy stolen goods no matter what profit we can make on same.’ ”

The testimony does not show that this letter was ever brought to the attention of Plaintiff in Error, Joseph Rosenthal. How it is possible that Maurice Rosenthal knew that the goods that Joseph Rosenthal was purchasing on the 31st of October were stolen, because in relation to a transaction thirty days before he insisted that his buyer should make sure that the cigarettes were not stolen, does not appear. Again, it will be remembered that Maurice Rosenthal was acquitted upon both counts, the Jury necessarily finding that he had no knowledge that any of the goods were stolen.

It is apparent that the entire argument contained in the brief of the United States Attorney for De-

fendant in Error has application only to the first count of the indictment, viz:

“buying and receiving”

but upon this count Plaintiff in Error was acquitted. The argument for Defendant in Error does not point out any evidence upon which the conviction,

“Did receive and have in his possession” could be sustained.

In order to show that Plaintiff in Error, Joseph Rosenthal,

“Did receive and have in his possession”

the cigarettes in question, it was incumbent upon the prosecution to produce evidence that he exercised control or dominion over the goods. There is no evidence to show that he had them in his actual or constructive possession, that he could have taken them into his possession, or that he had any control over them whatever, except as directed by the proprietor and sole owner of the Pacific Sales Company, Maurice Rosenthal. The testimony shows without dispute that the actual delivery was made to Fitch; that Fitch had the actual possession, under the direction and control of Maurice Rosenthal; yet we find both Fitch and Maurice Rosenthal acquitted on both counts of the indictment and Plaintiff in Error, Joseph Rosenthal, who had less to do with the transaction than either Fitch or Maurice Rosenthal, convicted of “having in his

possession" goods that he never saw and over which he had no control of any kind. Upon the evidence produced as to the only connection Joseph Rosenthal had with the transaction, viz., the making of the contract of purchase, we find him acquitted by the Jury of "buying and receiving".

It is respectfully submitted that the entire record clearly shows that the acquittal upon the first count is tantamount to an acquittal upon the second count, and that there is no evidence to sustain the verdict of the jury, convicting Plaintiff in Error on the second count.

Dated, San Francisco,
October 29, 1921.

JOSEPH E. BIEN,
Attorney for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH ROSENTHAL,

Plaintiff in Error,

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR A RE-HEARING ON BEHALF OF DEFENDANT IN ERROR

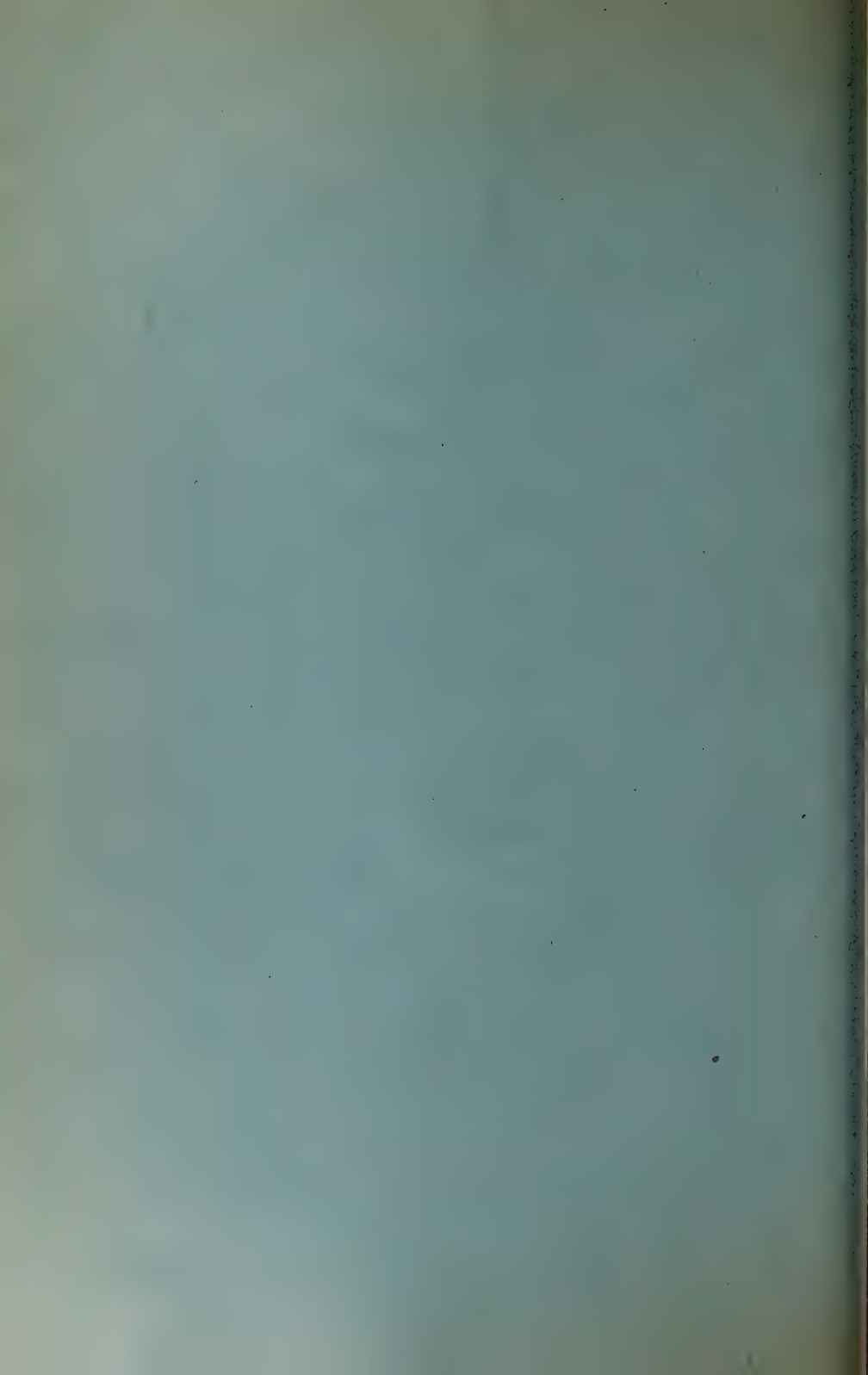
JOHN T. WILLIAMS,

United States Attorney,

T. J. SHERIDAN,

Asst. United States Attorney,

Attorneys for Defendant in Error.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

| | |
|----------------------------|---|
| JOSEPH ROSENTHAL, | } |
| <i>Plaintiff in Error,</i> | |

VS.

| | |
|----------------------------|---|
| UNITED STATES OF AMERICA, | } |
| <i>Defendant in Error.</i> | |

**PETITION FOR REHEARING ON BEHALF OF
DEFENDANT IN ERROR**

To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:

The defendant in error, the United States, respectfully petitions the United States Circuit Court of Appeals of the Ninth Circuit for a rehearing of the above-entitled cause, following the judgment and opinion filed therein on December 5, 1921, whereby the judgment of the United States District Court

for the Northern Division of the Northern District of California was reversed; and in that behalf we respectfully ask and urge that further consideration should be given to that certain proposition of law declared in the opinion, to wit, that the two findings in the verdict respecting the two separate counts of the indictment "were thus wholly inconsistent and conflicting."

And especially are we lead to urge upon the Court this reconsideration, for the reason that we find ourselves unadvised as to what would be the proper performance of our official duty in the premises respecting the future consideration of this case. The Court remands the cause for a new trial; it has not directed that there be a dismissal. Yet, however cogent the proof of guilt may be which we would be able to lay before the jury in a new trial, any verdict in such trial in favor of the Government would be equally inconsistent and repugnant to the former verdict on the first count, if it is to be taken as settled that the former verdict on the second count presented such inconsistency and repugnance.

1. THE VERDICT ON THE SECOND COUNT WAS NOT INCONSISTENT WITH, OR REPUGNANT TO, THE VERDICT ON THE FIRST COUNT.

The prosecution was based upon a portion of the Act of February 13, 1913 (c. 50, Sec. 1, 37 Stat. 670), which provides that whoever "*shall buy, or receive, or have in his possession any such goods or*

chattels, knowing the same to have been stolen" shall be punishable; the goods so referred to are interstate shipments of freight or express. It thus appears that the crimes denounced contain certain several elements, to wit, the common element of goods stolen from interstate commerce, the common element of knowledge of their being stolen and, as a final element, any one of three separate acts stated in the disjunctive, to wit, that the party charged shall *buy*, or *receive*. or have *in his possession*, the goods. Each phrase of the statute, under familiar rule, is to be given effect and meaning. As was well said in the Burton case (*Burton v. U. S.*, 50 L. ed. 1057, 1069),

"Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense."

And so an accused party may have violated the statute in question here in three several modes: He may *buy* with guilty knowledge, or, failing that, he may *receive* with guilty knowledge; or, having "received" but without guilty knowledge he may subsequently have *in his possession* with the necessary guilty knowledge any such goods. The statute is so framed that one can not hold *in his possession* knowingly stolen goods with impunity simply because he

may be able to show that his guilty knowledge came to him after he had *received* the goods.

Now in the case at bar, the first count of the indictment charged a *buying* and *receiving* with guilty knowledge. The second count was framed upon the theory of a possible failure on the part of the Government in being able to show that such acts were with contemporaneous guilty knowledge and therefore, in the second count, the third element—the holding of the goods *in possession* with guilty knowledge—was charged. The verdict of the jury on the second count is its declaration that it found sufficient evidence to show that the defendant held the goods *in his possession at a time* when he had guilty knowledge of their being stolen.

The Court cites as the authority for its holding on this point the case of *Morgan v. Devine*, 237 U. S. 632, 639, 640. But, with deference, we are unable to appreciate how the authority in any manner sustains the ruling; for, as we read the case, the holding is to the contrary. The judgment of the Court in that case was that the verdicts were not inconsistent; the petition for a writ of habeas corpus was directed to be dismissed. The Court quoted with approval the holding in the Burton case, cited above, and declared

“that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and *grow out of one transaction* does

not make a single offense where two are defined by statutes.”

The case of *Gavieres v. U. S.*, 220 U. S. 338, 55 L. ed. 489, cited in the Morgan case as an authority for the holding, was another instance where the Court refused to hold a verdict of a conviction or acquittal a bar to a subsequent conviction upon an indictment charging a different offense, although both indictments were based upon the same words and acts, it being shown that one indictment contained a different element from the other, and the Court quoted with approval from the case of *Morey v. Commonwealth*, 108 Mass. 433, as follows:

“A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”

So in the case of the second count of the indictment here, the element of the *purchase* or *initial receipt* of the goods *coupled* with guilty knowledge on the defendant's part was not necessary to a conviction for a subsequent holding in possession coupled with a guilty knowledge later acquired. For it must be borne in mind that, while it may be urged that one who receives goods necessarily takes them into his possession, yet the two conceptions are by no means identical, and the Congress was well advised in enacting them as separate elements of the proposed crime. For while the holding

in possession is continuous, the receipt of the goods is not a continuous act, and if the receipt only were denounced, a guilty defendant could frequently escape by the pretense that his guilty knowledge, if any, was acquired later during his holding in possession. Thus the two elements are distinct, both in law and in logic, and it can not be said that a verdict is inconsistent which finds that the initial receipt was innocent but a subsequent holding of the goods was criminal.

The case of *Morgan v. Devine*, as well as the sections of Bishop on Criminal Law quoted in the opinion in the case at bar, were given consideration by the Circuit Court of Appeals of the Sixth Circuit in the case of

Kelly v. United States, 258, Fed. 392, 398.

In that case it was held that the verdicts in question were not inconsistent. Similar rulings were made in the cases of

Hinkhouse v. United States, 266, Fed. 977, 978,

Huffman v. United States, 259 Fed. 35.

In the former case this Court held that under given circumstances the verdicts were not inconsistent, and pointed out that in the first count there was contained an element which in no wise entered into the offense charged in the second count.

And in the Huffman case, by a divided Court, it was held that the verdicts were not inconsistent;

while in the dissenting opinion, pains were taken by the writer to show that the variation in language between the two counts was unsubstantial and that the first count, upon which the conviction was had, did not contain any *substantial element* not contained in the others. But here we have in the second count an additional element—the holding of the goods in possession after a later acquired guilty knowledge.

2. THE VERDICT WAS SUSTAINED BY THE EVIDENCE.

It may be urged that the jury's verdict was illogical, that the defendant should have been found guilty on both counts or neither, or that if the jury believed that he subsequently retained possession with guilty knowledge, they should have believed that he also received with guilty knowledge. But, as was well said by Judge Dickinson of the United States District Court of the Eastern District of Pennsylvania, in referring to a similar claim, "mere formal logical consistency is not one of the crown jewels of juries, and happily so" (272 Fed. 505).

We do not here discuss the question of sufficiency of the evidence to justify the verdict on the second count, for the reason that as the Court states in its opinion, "there was ample evidence given to sustain the verdict of guilty against the plaintiff in error under the second count." And as we have pointed out in the opening of this discussion, if it had been a mere case of the insufficiency of evidence, we

might endeavor to reinforce the Government's case on a new trial; but if we are to be confronted under the principle of the "law of the case" with the holding of this Court that the verdicts were necessarily inconsistent, we could not hope to have any favorable result on a new trial.

We therefore urge that this Honorable Court should order a rehearing of this case for the reasons hereinabove set forth.

Dated: December 30, 1921.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney,

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Defendant in Error.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for Defendant in Error and petitioners in the above entitled cause, and that in our opinion the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

JOHN T. WILLIAMS,
United States Attorney.

T. J. SHERIDAN,
Asst. United States Attorney,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE ROSS-HIGGINS COMPANY, a Corporation,
Plaintiff in Error,
vs.
L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Fourth Division.

FILED
SEP 14 1912
P. O. MORRISTON
CLERK

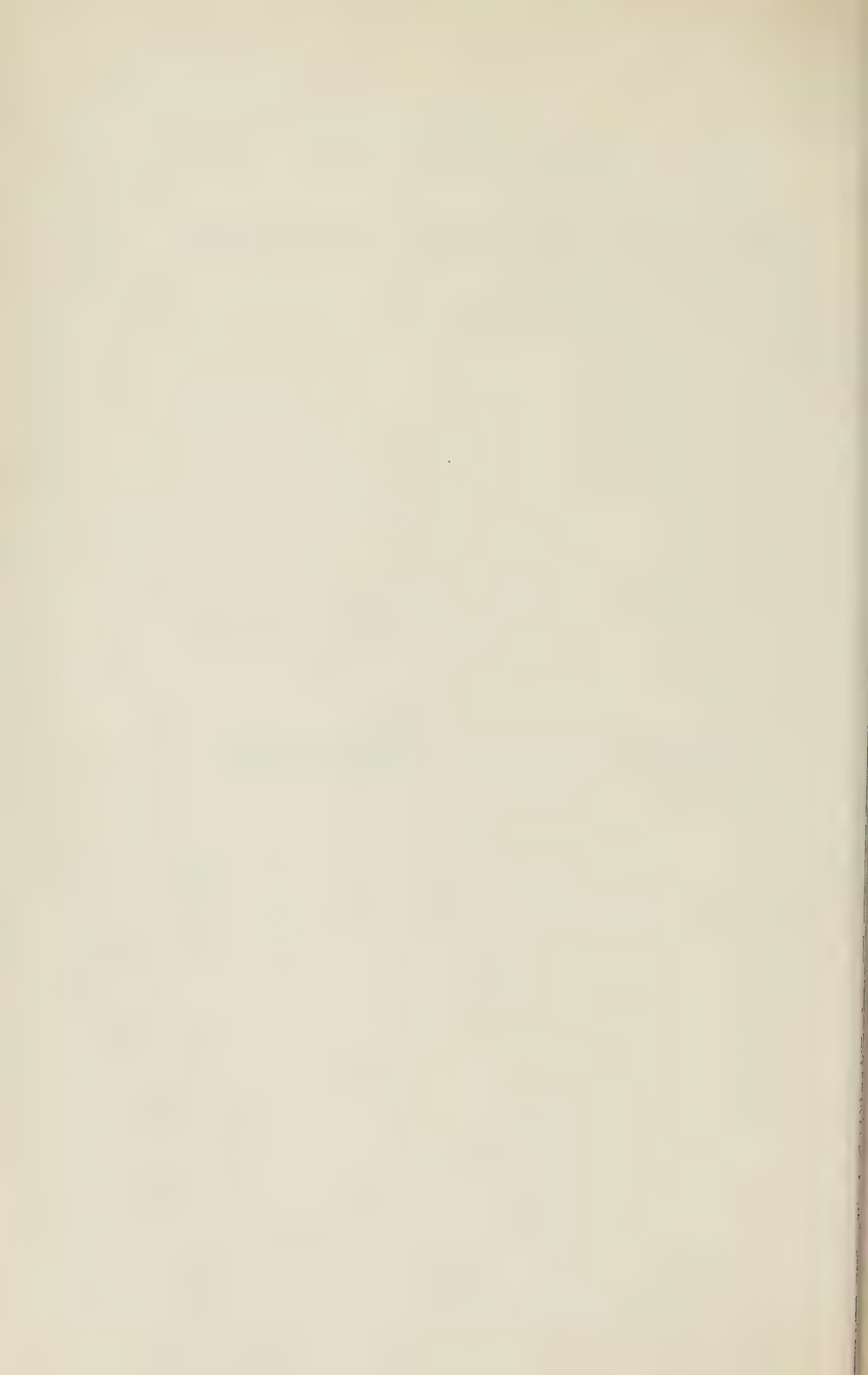
United States
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

LOUIS K. PRATT, Attorney for Plaintiff and
Plaintiff in Error,

Fairbanks, Alaska.

A. R. HEILIG, Attorney for Defendants and De-
fendants in Error,

Fairbanks, Alaska. [1*]

In The District Court For The Territory of Alaska,
Fourth Division.

No. 1624.

THE ROSS-HIGGINS COMPANY, a Corporation,
Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants.

Praeceptum for Transcript of Record.

The clerk will please prepare and certify to a transcript of the record in this action, for use as the basis of a writ of error sued out by the plaintiff, as follows:

1st. The defendants' amended demurrer to the original complaint.

2nd. The amended complaint filed by plaintiff.

3rd. The answer of defendants.

4th. The motion of plaintiff asking that a part of its amended complaint and parts of the answer be stricken out.

*Page-number appearing at foot of page of original certified Transcript of Record.

5th. The amended answer.

6th. The motion of plaintiff to strike out parts of the amended answer.

7th. Plaintiff's demurrer to certain of the defenses in the amended answer.

8th. The reply.

9th. The findings of fact and conclusions of law as signed by the Judge and entered of record.

10th. The plaintiff's "objections, eliminations, substitutions, corrections and additions" as affecting the findings and conclusions tendered by defendants' attorney.

11th. The exceptions to the findings of fact and conclusions of law. [2]

12th. The motion for a new trial.

13th. All journal entries made during the progress of the case including the final judgment.

14th. The opinion of the trial Judge.

15th. All papers connected with the writ of error, except the writ of error, citation and order enlarging the return day of the writ of error. The last three are original papers and must be forwarded to the Appellate Court at San Francisco, California.

LOUIS K. PRATT,

Attorney for Plaintiff Below and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By R. H. Geoghegan, Deputy. [3]

[Title of Court and Cause.]

Amended Demurrer to Complaint.

Come now the defendants and demur to the complaint filed in this action upon the following grounds:

1. That it does not appear upon the face of said complaint that the plaintiff has legal capacity to sue.

2. That the plaintiff has no legal capacity to sue or bring this action in that it is a foreign corporation doing business in Alaska and the complaint does not show that it has complied with the provisions of Chapter 23, Part V, of Carter's Alaska Codes.

That the complaint does not state facts sufficient to constitute a cause of action.

A. R. HEILIG,
Atty. for Defts.

Received copy May 11, 1912.

LOUIS K. PRATT & SON,
Atty. for Pltff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [4]

[Title of Court and Cause.]

Order in re Demurrer to Original Complaint.

The Court having heretofore heard argument on defendants' demurrer to plaintiff's complaint here-

in and taken the same under advisement, and being now fully and duly advised in the premises, renders its oral opinion in open court:

Now, therefore, it is ordered that the first ground of defendants' demurrer, as set forth in defendants' amended demurrer to complaint, be, and the same is, hereby sustained.

It is further ordered that the second ground of defendants' demurrer to plaintiff's complaint, as set forth in defendants' amended demurrer, be, and the same is, hereby overruled.

It is further ordered that plaintiff herein be, and it is, hereby granted sixty days in which to amend its complaint herein.

Done in open court at Fairbanks, Alaska, this 31st day of May, 1912.

PETER D. OVERFIELD,
District Judge.

Entered in Court Journal No. 12, page 38.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 31, 1912. C. C. Page, Clerk. By H. C. Green, Deputy. [5]

[Title of Court and Cause.]

Amended Complaint.

The plaintiff, by leave of Court, files this its amended complaint, and for a cause of action against the defendants alleges:

I.

That at all times mentioned herein, it was a cor-

poration, duly organized and existing under and by virtue of the laws of the State of Oregon; that it became such corporation under said laws in the year 1900 and afterwards transacted a general mercantile business in the Territory of Alaska, its principal place of business being at Skagway with a branch store at Fairbanks, in the then Third, now Fourth Judicial Division, at which last mentioned point the plaintiff conducted the said branch store during the year 1906 and a part of 1907; that on or about June or July of 1907 it closed out its mercantile business in the Territory of Alaska, and sold off its stock in trade and from that time on transacted no corporate business in the said Territory, other than such as was necessary in winding up its affairs in paying its debts and collecting its outstanding accounts; that before commencing and during the time it transacted a mercantile business in Alaska, as aforesaid, it complied with the provisions of Chapter 23, page 401, Carter's Alaska Code, on the subject of Foreign Corporations, by filing in the office of the Secretary of the said Territory of Juneau, Alaska, and also in the office of the Clerk of the District Court for the First Judicial Division at Juneau, an authenticated copy of its articles of incorporation, a written statement containing the information required by section 225, page 401, C. A. C., its consent [6] in writing to be sued in the District of Alaska, and the designation of a person upon whom service of process might be made in said Territory and the acceptance of such designation and consent of such person in writing to act in that capacity for the plain

tiff company; that thereafter, and during the time that it was engaged in business in Alaska, it filed the annual written statement required by section 229, page 402, C. A. C., in the office of the Secretary of said District at Juneau, and also a duplicate thereof in the office of the Clerk of the District Court for the First Judicial Division at Juneau and with the Clerk of the District Court for the Third, now the Fourth Judicial Division of Alaska at Fairbanks.

II.

That on the 20th day of August, 1908, the plaintiff commenced an action in the said court numbered on the records thereof 1095, entitled "The Ross-Higgins Company, a Corporation, Plaintiff, vs. Alfred M. Ohlsen, Doing Business in the Name of The Fox Trading Company, Defendant"; that in the said action and at the commencement thereof, the said plaintiff caused a writ of attachment to issue against the property of the said defendant Alfred M. Ohlsen, and placed the same in the hands of the marshal of the said Division, for service, who on the 27th day of August, 1908, levied the same upon a stock of merchandise and fixtures belonging to the defendant Ohlsen, of the value of nineteen hundred dollars (\$1900), the said personal property so attached being described as follows:

2500# flour (soft).

800# flour (hard).

2 $\frac{3}{4}$ cases Lubeck spuds.

95# dried fruit.

3 cases Agen butter.

1 case mutton.

- 3 cases sausage, etc.
- 1 case canned cabbage.
- About \$10.00 drugs.
- 1 case Ivory soap.
- 12# assorted tobacco.
- 5# starch.
- 13 pkgs. yeast.
- $\frac{3}{4}$ case soda.
- 11 pkgs. currants.
- 6 cans spices.
- 136 cans asstd. canned goods. [7]
- 20 cans salmon.
- 21 cans clams.
- 12 cans sausage.
- 42 cans sardines.
- 11 pkgs. grape nuts.
- 2 cartons soap.
- 14 pr. rubber boots.
- One $\frac{1}{2}$ keg corn beef.
- One $\frac{1}{2}$ pickled pork.
- 15# smoked mat.
- 2 and one-half gal. Molasses.
- 5# macaroni.
- 3 gal. honey.
- 2 gal. syrup.
- 1 case ox tongue.
- 13 bot. pickles.
- 3 bot. olive oil.
- 32 pkgs. oats.
- 50# lard.
- 13 pkgs. Bromangelon.

- 14 cans eggs.
- 7 pkgs. Germea.
- 3 pkgs. Force.
- 34 pkgs. L toilet soap.
- 425# beans.
- 400# rice.
- 10 pr. rubber boots.
- 8 $\frac{3}{4}$ cases Eagle Milk.
- 1 case clams.
- 1 case lunch tongue.
- 3 cases corn beef.
- 20 boxes candies.
- 1 can matches.
- 20# sugar.
 - About \$75 asstd. fittings.
- 50# dried peaches.
- 6 hammers.
- 2 and one-half kegs nails.
- 2 windows.
- 2 scales.
- 1 gold scale (32).
- 1 small showcase.
- 2 counters.
- 75# cheese.
- 5 pocket-knives.
- 19 graniteware utensils.
- 6 bake pans.
- 3 water buckets.
- 3 small fry-pans.
- 1 large.
- 4 tube.
- 4 brooms.
- 1 coil rope.

- 40# buckwheat.
- 90# rolled oats.
- 20# tapioca.
- 1 doz. chimneys.
- 1 half roll paper.
- 6 axes.
- About \$10.00 hardware.
- 1 kit mackerel.
- 20 joints stove-pipe.
- 1 jack plane.
- 1 sluice fork.

That thereafter and on September 7, 1908, the said attached property was claimed by one Peter Vachon pursuant to section 145, page 175, Carter's Alaska Code, who thereupon caused to be executed the bond provided for in the said section to secure the release of the possession of the said attached property, which said bond was signed by the defendants L. F. Protzman and F. S. Gordon, as sureties; whereupon the said marshal, by reason of the giving of the said bond, released his possession of the said attached property and delivered the same to the said claimant, Peter Vachon; that the obligee in the said forthcoming bond so executed by the defendants was H. K. Love, the marshal of said Division, who on December 9th, 1910, assigned all his right, title, and interest therein to the plaintiff. The said bond and assignment are in words and figures as follows:

In the District Court for the Territory of Alaska,
Third Division.

No. 1095.

THE ROSS-HIGGINS CO., a Corporation,
Plaintiff,

vs.

ALFRED M. OHLSEN, Doing Business in the
Name of the FOX TRADING CO.,
Defendant.

Bond on Release of Attachment.

Whereas, the above-named plaintiff commenced an action in the District Court for the Territory of Alaska, Third Division, against [8] the above-named defendant claiming that there was due to said plaintiff from said defendant the sum of fifteen hundred eighty-nine dollars and seventy-two cents, together with eight per cent per annum interest from January 1st, 1908, and thereupon an attachment issued against the property of the said defendant as security for the satisfaction of any judgment that may be recovered therein and certain property and effects claimed to be the property of the said defendant has been attached and seized by the United States Marshal for the Third Division of the Territory of Alaska, under and by virtue of the said writ; and

Whereas, Peter Vachon at the time and before the commencement of said suit, and at the time and before the levy of said writ had a chattel mortgage

upon all of said property so attached, which said mortgage is dated the 8th day of April, 1908, and made by A. M. Ohlson to Peter Vachon, which said mortgage was recorded on the 9th day of April, 1908, at 20 minutes past 12 noon, and recorded in Vol. 2 of Chattel Mortgages in the office of the Recorder of the Fairbanks Recording District, Territory of Alaska, and which said mortgage and the amount due thereon and secured thereby has not been paid, nor any portion thereof, and the said mortgage at the time of the commencement of said action and the issuance of said writ and the levy upon said property was in full force and effect and is now in full force and effect, and the said Peter Vachon is the owner and holder of the note secured by said mortgage, and the owner of said mortgage, and was at the time of the commencement of said action and issuance of said writ and the levy upon said property, and claims the said property by virtue of said chattel mortgage.

Now, therefore, we, the undersigned, residents of the Territory of Alaska, in consideration of the premises and in consideration of the delivery of said property to the said Peter Vachon do hereby jointly and severally undertake in the sum of two thousand dollars and promise and engage to redeliver the said property or pay the value thereof to the said United States Marshal to whom execution upon a judgment obtained by plaintiff in said action may be issued.

[9]

L. F. PROTZMAN. (Seal)

F. S. GORDON. (Seal)

Witnesses:

W. F. WHITELY.

J. S. STERLING.

United States of America,
Territory of Alaska,—ss.

L. F. Protzman and F. S. Gordon, being each duly sworn, deposes and says: That he is a resident of the Territory of Alaska; that he is not a counsellor or attorney at law, marshal, deputy marshal, clerk of the court or other officer of the court; that he is worth the sum of two thousand dollars over and above his just debts and liabilities in property exempt from execution.

L. F. PROTZMAN.

F. S. GORDON.

Subscribed and sworn to before me this the 6th day of September, 1908.

[Seal]

M. L. SULLIVAN,

Notary Public for Alaska.

The foregoing undertaking is satisfactory to me, and the marshal's office is at liberty to turn the attached property over to Mr. Vachon.

Dated at Fairbanks, Sept. 7th, 1908.

LOUIS K. PRATT,

Plffs. Atty.

I hereby assign and set over to the plaintiff in above case, Ross-Higgins & Co., all my right, title, and interest in the foregoing bond.

At Fairbanks, Alaska, Dec. 9, 1910.

H. K. LOVE,

U. S. Marshal.

[Endorsed]: No. 1095. #2096. In the District Court for the Territory of Alaska, Third Division. Ross-Higgins Co., Plaintiff, vs. Alfred M. Ohlsen, Defendant. Bond on Release of Attachment and Assignment by U. S. Marshal. Filed in the District Court, Territory of Alaska, 4th Div. Dec. 9, 1910. C. C. Page, Clerk.

III.

That thereafter such proceedings were had in the said cause that on the 9th day of January, 1911, the said Court rendered judgment and decree in the said action 1095 in favor of plaintiff therein, The Ross-Higgins Company, a corporation, and against [10] the said Alfred M. Ohlsen, the defendant therein, for the sum of one thousand three hundred and sixty-seven dollars and fifty cents (\$1,367.50) debt, and for the further sum of thirty-seven dollars and thirty-five cents (\$37.35) as the costs and disbursements of the action, and in the same judgment and decree foreclosed the said plaintiff's attachment lien upon the property above described and ordered that the same be sold to satisfy the said judgment and the costs.

That thereafter and on the 6th day of February, A. D. 1911, plaintiff in the said action number 1095 and also the plaintiff in this caused a special execution to issue out of said court directed to the marshal of the Fourth Division, requiring him to seize and take into his possession the said attached property and sell the same in the manner provided by law and apply the proceeds thereof upon the said judgment and costs and make return of the said writ

within sixty days of the date thereof, which said special execution was by the said plaintiff delivered to the marshal of the said division for service, who did on the 27th day of February, 1911, demand of the said Peter Vachon and the defendants in this cause a delivery of the said attached property to him, the said marshal, or its value, to enable him to execute the said special execution; that the said Peter Vachon, and especially the defendants herein, failed, neglected and refused to so deliver the said attached property to the marshal or pay to him the value thereof, and the marshal was compelled to and did, in fact, on the 1st day of March, 1911, return the said execution into the said court wholly unsatisfied.

IV.

That the said judgment and decree above described remains of record in the said court in full force and effect and wholly unsatisfied, and by reason of the premises the plaintiff has been damaged by the defendants in the full sum of said judgment and costs and the accrued interest thereon.

WHEREFORE the plaintiff prays judgment against the defendants for the sum of Fourteen Hundred and Four Dollars and Eighty-five [11] Cents (\$1404.85), together with eight per cent (8%) per annum interest thereon from January 9th, 1911, and for the costs and disbursements of the action.

LOUIS K. PRATT & SON,

Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Louis K. Pratt on oath says: That he is one of the attorneys for the plaintiff herein, a foreign corporation; that this action is based on the forthcoming bond given by the defendants in connection with attachment proceedings in the case No. 1095 on the records of this court entitled "The Ross-Higgins Company, a Corporation, Plaintiff, against Alfred M. Ohlsen, Doing Business in the Name of the Fox Trading Company, Defendant," in which last-mentioned case affiant was attorney for the plaintiff therein; that the bond in this action provides for the delivery of attached property or the direct payment of the value of the said property in money, which said bond is now in the files of said court in the said cause No. 1095; that he has read the foregoing amended complaint and knows the contents thereof, and the same are true, as he verily believes.

LOUIS K. PRATT.

Subscribed and sworn to before me this 7th day of Aug., 1912.

[Seal]

HARRY E. PRATT,

Notary Public in and for Alaska.

Received copy Aug. 7, 1912.

A. R. HEILIG,

Atty. for Dfts.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Aug. 7, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. [12]

[Title of Court and Cause.]

Answer.

Come now the defendants and for answer to the amended complaint herein—

Answering paragraph I they deny that the principal place of business of the plaintiff corporation was at any time in Skagway, Alaska, and deny that at any time other than on August 14, 1906, said corporation filed with the clerk of the District Court for the Third, now Fourth, Division of Alaska at Fairbanks, the annual statement required by section 229, part V, of Carter's Code of Alaska.

Answering paragraph II they deny that on August 27, 1908, the marshal of said division levied a writ of attachment upon the stock of merchandise and fixtures belonging to A. M. Ohlsen of the value of \$1900 and itemized in said paragraph, or upon any part thereof, and deny that the articles mentioned in the itemized list contained in said paragraph were worth on said date a greater sum than \$1300.

Answering paragraph III they deny that the Court foreclosed plaintiff's alleged attachment lien upon the property in said complaint described.

They deny each and every allegation contained in paragraph V.

For a further defense and as a bar to this action defendants allege:

That on the 18th day of July, 1906, and continuously thereafter the principal place of business in Alaska of said corporation was at Fairbanks,

Alaska; that the object of action No. 1095 described in paragraph II of the complaint, brought by plaintiff [13] herein against A. M. Ohlsen was to recover a debt due for merchandise sold at Fairbanks, Alaska, by said plaintiff to said A. M. Ohlsen; that at no time did said plaintiff file in the office of the clerk of the District Court for the Third, now Fourth Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void.

For a second and further defense to this action defendants allege:

That the property described in paragraph II of the complaint herein and for which the undertaking set out in said complaint was given, at the time of the attempted execution of the writ of attachment in said complaint described did not belong to A. M. Ohlsen, or any part thereof.

For a further defense to this action defendants allege:

That at the time of the issuance of the writ of attachment described in said complaint all the property described in paragraph II thereof was subject to the lien of a mortgage given by the said A. M. Ohlsen to the said Peter Vachon on the 8th day of April, 1908, to secure the payment by the said Ohlsen to the said Vachon of \$500 on May 15, 1908, \$1500 on June 1, 1908, \$500 on June 15, 1908, \$500 on July 1, 1908, \$425 on July 15, 1908, and \$427.07 on August 1, 1908, which mortgage was duly executed

and acknowledged on the 8th day of April, 1908, by the said A. M. Ohlsen, and on the same day said A. M. Ohlsen and said Peter Vachon each made affidavit thereto and thereon to the effect that the same was made in good faith to secure the amount named therein and without any design to hinder, delay or defraud creditors, and was on the 9th day of April, 1908, duly filed and properly recorded and indexed in Volume 2 of Chattel Mortgages in the office of the recorder of Fairbanks Precinct, Alaska, in which precinct said A. M. Ohlsen then resided and wherein said property was then situate; that at the time of the issuance of said writ of attachment said mortgage debt was due and unpaid; that before the marshal for said division [14] attempted to take the property covered by said mortgage and described in the complaint herein, he did not pay or tender to the said mortgagee nor to any assignee thereof the amount of said mortgage debt nor any part thereof, neither did he deposit the amount thereof nor any part thereof with the recorder of said precinct, nor did he at any subsequent time make such payment tender or deposit, wherefore his attempted levy upon said property was void, and the undertaking sued upon in this action was without consideration.

WHEREFORE defendants pray judgment that plaintiff take nothing by this action and that they recover their costs and disbursements herein.

A. R. HEILIG,
Atty. for Defendants.

Territory of Alaska,
Fourth Division,—ss.

F. S. Gordon, being duly sworn, deposes and says that he is one of the defendants above named; that the allegations contained in foregoing answer are true to the best of his knowledge, information and belief.

F. S. GORDON.

Subscribed and sworn to before me this 18th day of September, 1912.

[Seal]

ALBERT R. HEILIG,

Notary Public, District of Alaska.

Received copy September 18, 1912.

LOUIS K. PRATT & SON,

Attys. for Pltff.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 19, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. Pltff.'s Identification No. 1. May 2, 1919. #1624. J. E. Clark, Clerk. By Frank B. Hall, Deputy. No. 1624. Pl. Exhibit "G," Ross-Higgins Co., Plaintiff, vs. L. F. Protzman et al., Defendants. Filed in the District Court, Territory of Alaska, 4th Div. Feb. 26, 1920. H. Claude Kelly, Clerk. By John E. Pegues, Deputy. [15]

[Title of Court and Cause.]

**Motion for Orders Respecting the Amended
Complaint and Answer.**

The plaintiff moves the Court for the following orders:

I.

For an order striking out all of paragraph I of plaintiff's amended complaint other than the following: "That at all times mentioned herein, it was a corporation duly organized and existing under and by virtue of the laws of the State of Oregon," for the reason that all other statements contained therein are redundant, irrelevant and immaterial.

II.

For an order striking from the answer what purports to be a denial of some of the allegations contained in the first paragraph of the amended complaint, for the reason that that part of the answer is redundant, irrelevant and immaterial.

III.

For an order striking from the answer that part purporting to be a denial of some of the allegations of the second paragraph of the amended complaint, for the reason that that portion of the answer is sham, frivolous and irrelevant and is a denial of matters the defendants are estopped from denying by reason of having signed the forthcoming bond which is the foundation of plaintiff's amended complaint.

IV.

For an order striking from the answer that part

found on page 1 thereof designated, "For a further defense and as a bar to this action defendants allege"; for the reason that the same is redundant, irrelevant and immaterial, and for the further reason that the defendants are estopped from relying upon the matters therein mentioned [16] as a bar to the plaintiff's action, by reason of the judgment in the said action No. 1095 therein referred to and the giving of the forthcoming bond, the foundation of plaintiff's cause of action set up in its amended complaint.

V.

For an order striking out that part of the answer found on page 1 thereof designated, "For a second and further defense to this action defendants allege"; for the reason that the same is sham, frivolous, irrelevant, immaterial and in flat contradiction of the allegations contained in the supposed further defense found in the answer on page 2.

VI.

For an order striking from the answer that part thereof found on page 2 and designated, "For a further defense to this action defendants allege"; for the reason that the same is sham, frivolous, immaterial, irrelevant and the defendants are estopped and precluded from raising the questions therein attempted to be raised, by reason of the execution of the forthcoming bond, the foundation of plaintiff's cause of action in its amended complaint, the execution of which is not denied by the defendants in their said answer.

The records and files in the action will be used in support of this motion.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

Due service of the foregoing motion by receipt of copy thereof is hereby admitted this 3 day of Oct., A. D. 1912.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 3, 1912. C. C. Page, Clerk. By P. R. Wagner, Deputy. [17]

(Title of Court and Cause.)

**Order on Motion for Orders Respecting Amended
Complaint and Answer.**

This cause came on to be heard by the Court in March, 1915, on plaintiff's motion as on file, to strike out portions of the answer, and was fully argued by Louis K. Pratt for plaintiff and A. R. Heilig for defendants, and the same was taken under advisement.

Now, at this time, to wit, September 7th, 1915, the Court being fully advised in the premises, it is ordered that the 1st, 2d, 3d, 4th and 5th requests for orders, contained in said motion be, and the same are, hereby denied, and that the 5th request made by said motion, i. e., to strike out the last defense contained in said answer and commencing at the top of page 2 thereof, be and the same is hereby sustained, and the said last described portion of the same is

stricken from the answer on the grounds set forth in said 6th request. Defendants may have ten days to file an amended answer, as they may be advised.

Dated this 7th day of September, A. D. 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 212.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div., Sep. 7, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [18]

(Title of Court and Cause.)

Amended Answer.

Come now the defendants and for their amended answer to the amended complaint herein—

Answering paragraph I they deny that the principal place of business of the plaintiff corporation was at any time in Skagway, Alaska, and deny that at any time other than on August 14, 1906, said corporation filed with the clerk of the District Court for the Third now Fourth, Division of Alaska, at Fairbanks, the annual statement required by section 658 of the Compiled Laws of Alaska.

Answering paragraph II they deny that on August 27, 1908, the marshal of said division levied a writ of attachment upon the stock, of merchandise and fixtures belonging to A. M. Ohlsen of the value of \$1900, and itemized in said paragraph, or upon any part thereof, and deny that the articles mentioned in said

itemized list contained in said paragraph were worth on said date a greater sum than \$1300.00.

Answering paragraph III they deny that the Court foreclosed plaintiff's alleged attachment lien upon the property in said complaint described.

They deny each and every allegation contained in paragraph IV.

For a further defense and as a bar to this action defendants allege—

That on the 18th day of July, 1906, and continuously thereafter the principal place of business in Alaska of said corporation was at Fairbanks, Alaska; that the object of action No. 1095 described in paragraph II of said complaint brought by plaintiff herein against A. M. Ohlsen, was to recover a debt due by said Ohlsen to [19] plaintiff for merchandise sold at Fairbanks, Alaska, by said plaintiff to said Ohlsen; that at no time did said plaintiff file in the office of the clerk of the district court for the Third, now Fourth, Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void.

For a second and further defense to this action defendants allege:

That the property described in paragraph II of the complaint herein and for which the undertaking set out in said complaint was given, at the time of the attempted execution of the writ of attachment in said complaint described, did not belong to A. M. Ohlsen, or any part thereof.

For a further defense to this action defendants allege:

That at the time of the issuance of the writ of attachment described in said complaint and at the time of the attempted levy under said writ by said marshal upon the property described in said complaint, all the property described in paragraph II thereof was subject to the lien of a mortgage given by the said A. M. Ohlsen to the said Peter Vachon, both named in said complaint, on the 8th day of April, 1908, to secure the payment by the said Ohlsen to the said Vachon of \$500 on May 15, 1908, \$1500 on June 1, 1908, \$500 on June 15, 1908, \$500 on July 1, 1908, \$425 on July 15, 1908, and \$427.07 on August 1, 1908, in which amounts said Ohlsen was then indebted to said Vachon, which mortgage was duly executed and acknowledged on the 8th day of April, 1908, by said A. M. Ohlsen, and on the same day said A. M. Ohlsen and said Peter Vachon each made affidavit thereto and thereon to the effect that said mortgage was made in good faith to secure the amount named therein, being the several sums above named, and without any design to hinder, delay or defraud creditors, and was [20] on the 9th day of April, 1908, duly filed and properly recorded and indexed in Volume 2 of Chattel Mortgages in the office of the Recorder for Fairbanks Precinct, Alaska, in which precinct said Ohlsen then resided and wherein said property was then situate; that at the time of the issuance of said writ of attachment and at the time of the attempted levy under said writ by said marshal upon the property described

in said complaint and in said mortgage said mortgage debt and the whole thereof was due and unpaid, excepting \$603.92; that prior to the time of the attempted levy by said marshal of said writ of attachment upon the property described in said complaint and in said mortgage, all of said property had been delivered by the said Ohlsen to the said Vachon and was at and prior to said attempted levy in the possession of said Vachon as mortgagee; that said marshal had actual knowledge of all the facts in this paragraph hereinbefore stated at the time he made said attempted levy upon said property under said writ of attachment; that before said marshal attempted to take the property covered by said mortgage and described in the complaint herein under said writ of attachment he did not pay or tender to the said mortgagee nor to any assignee thereof the amount of said mortgage debt nor any part thereof, neither did he deposit the amount thereof nor any part thereof with the recorder of said precinct, nor did he at any subsequent time make such payment tender or deposit; that although all the property described in said complaint and in said mortgage has been sold, by said mortgagee with the consent of the mortgagor under a power contained in said mortgage, and the proceeds and value thereof applied upon account of said mortgage debt, a large part of said mortgage debt still remains unpaid; that notwithstanding his knowledge of the facts hereinbefore set forth the said marshal persisted in his attempt to levy upon and take possession of the property described in said complaint and in said mortgage, and as a condition

for desisting from such attempt exacted from the said Vachon the bond sued upon in this action, whereupon the said Vachon for the purpose of retaining [21] his lawful possession of said property caused to be given to said marshal the bond sued upon in this action; that by reason of the premises the attempted levy upon said property by said marshal was void, and the undertaking sued upon in this action was unlawfully exacted by said marshal, and was and is null and void and without consideration.

WHEREFORE defendants pray judgment that plaintiff take nothing by this action and that they recover their costs and disbursements herein.

A. R. HEILIG,
Atty. for Defts.

Territory of Alaska,
Fourth Division,—ss.

L. F. Protzman, being duly sworn, deposes and says that he is one of the defendants in above-entitled action; that he has read foregoing amended answer and that the allegations therein contained are true as he believes.

L. F. PROTZMAN.

Subscribed and sworn to before me this 17th day of September, 1915.

[Seal] ALBERT R. HEILIG,
Notary Public, Territory of Alaska.

My commission expires June 18, 1917.

Received copy Sep. 17, 1915.

LOUIS K. PRATT & SON,
Attys. for Pltffs.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 17, 1915. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [22]

[Title of Court and Cause.]

Motion for Orders Affecting Amended Answer.

The plaintiff moves the Court for the following orders directed against the amended answer herein:

1st. For an order striking from the said amended answer that part thereof found on page 1 and designated, "For a further defense and as a bar to this action defendants allege," for the reason that the allegations thereof are irrelevant, and immaterial as a defense to this action and could only have been material, if at all, in the original action No. 1095, entitled "The Ross-Higgins Company, a Corporation, Plaintiff, vs. Alfred M. Ohlsen, Defendant," the present action being one as assignee of a forthcoming bond acquired by plaintiff after it has ceased to do a mercantile business in Alaska and not connected therewith, and further, because the said supposed defense is argumentative and based upon a mere conclusion.

2d. For an order requiring the defendants to make that part of their amended answer found near the bottom of page 1 and designated, "For a second and further defense to this action defendants allege," more definite and certain, by setting out the name of the person or persons, firm or corporation, owning the attached property at the time of the levy thereof.

3d. For an order striking from the said amended answer that part thereof found on page 2 and designated, "For a further defense to this action defendants allege," for the reason that the same matter inserted in the original answer was stricken out by the Court on motion of plaintiff, as sham, frivolous, immaterial, irrelevant, and because defendants were estopped from raising the questions therein attempted to be raised by that part of the supposed answer, on which ruling said defendants were given to and until September [23] 17, 1915, to amend the same, and for the reason that the part of the amended answer above described is sham, irrelevant, immaterial, and defendants are estopped and precluded from raising the questions therein attempted to be raised, by reason of the execution of the forthcoming bond, the foundation of plaintiff's cause of action in its amended complaint, the execution of which is not denied by defendants in their said amended answer.

LOUIS K. PRATT & SON,
Attorneys for Plaintiff.

Service of foregoing motion, by copy thereof, acknowledged this 20th day of September, 1915.

A. R. HEILIG,
Attorney for Defts.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sept. 20, 1915. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [24]

[Title of Court and Cause.]

General March, 1915, Term—One Hundred and Ninth Court Day.

Adjourned Session—October 11th, 1915.

Order Denying Motion Affecting Amended Answer.

Now, on this day, Louis K. Pratt appearing for and in behalf of plaintiffs and A. R. Heilig appearing for and on behalf of defendants, plaintiff's motion for order affecting amended answer having previously been taken under advisement by the Court,—

It is now ORDERED that plaintiff's motion for order affecting amended answer be, and the same is, hereby denied, and plaintiffs may have twenty days in which to plead further.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 282. [25]

[Title of Court and Cause.]

Demurrer to Affirmative Defenses in Amended Answer.

The plaintiff demurs to that part of the amended answer found on page 1 thereof and designated, "For a further defense and as a bar to this action defendants allege," for the reason that the allegations and statements therein made are insufficient

in law to constitute a defense to plaintiff's amended complaint herein.

Plaintiff demurs to that part of the amended answer found near the bottom of page 1 thereof and called "For a second and further defense to this action defendants allege," upon the ground that the matters and things therein stated are insufficient as a matter of law to constitute any defense to plaintiff's amended complaint.

Plaintiff demurs to that part of defendants' amended answer found on page 2 thereof and headed, "For a further defense to this action defendants allege," because the allegations and statements contained in the said last mentioned supposed defense are insufficient to constitute any defense to the allegations of plaintiff's amended complaint.

LOUIS K. PRATT & SON,

Attorneys for Plaintiff.

Service of the foregoing Demurrer, by copy thereof, acknowledged this 11th day of November, 1915.

A. R. HEILIG,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Nov. 11, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. [26]

General March, 1917, Term—Eighty-second Court Day.

Wednesday, October 10th, 1917.

[Title of Court and Cause.]

Order Overruling Demurrer to Affirmative Defenses.

Now, on this day, this cause having been heretofore heard by the Court upon the demurrer of the plaintiff, and the Court having taken the matter under advisement and reserved decision thereon and being fully and duly advised in the premises,—

It is ordered that the said demurrer be, and is hereby, overruled, and the plaintiff be allowed ten days in which to reply.

Entered in Court Journal No. 14, page 132.

CHARLES E. BUNNELL,
District Judge. [27]

[Title of Court and Cause.]

Reply to New Matter in Amended Answer.

I.

For a reply to the supposed first affirmative defense, found on page 1 of the amended answer, and designated, "For a further defense and as a bar to the action," etc., plaintiff says: That it denies that on July 18, 1916, or continuously thereafter, or at any other time, its principal place of business was at Fairbanks, Alaska.

Replying to that part of the supposed amended

answer found near the bottom of page 1 and called, "For a second and further defense to the action," etc., plaintiff alleges that it denies that the property taken under the writ of attachment and described in the second paragraph of the amended complaint belonged to some person other than A. M. Ohlsen, but, on the contrary, plaintiff alleges that said personal property, at the time of such levy, was owned by the said A. M. Ohlsen.

For a reply to that part of the supposed amended answer found on page 2 thereof and headed, "For a further defense to this action," etc., plaintiff says that it denies that at the time of the levy of the attachment on the personal property described in paragraph 2 of the amended complaint, said property was subject to a or any lien of a chattel mortgage given on said property prior to such levy, by A. M. Ohlsen to Peter Vachon, and plaintiff further denies that at any time prior to such levy, the said A. M. Ohlsen delivered possession of said personal property to said Peter Vachon; denies that said Vachon had possession of said attached property or any part thereof at any [28] time prior to such levy; denies that plaintiff forced the said Vachon to give the forthcoming bond made the basis of this action, but, on the contrary, alleges that the same was executed freely and voluntarily by the defendants to effect the release of said personal property from the possession of the marshal.

For a reply of new matter as a defense to the statements found in that part of the amended answer, found on page 2 thereof and designated therein,

“For a further defense to this action,” etc., plaintiff alleges:

That the pretended chattel mortgage dated April 8, 1908, given by A. H. Ohlsen to Peter Vachon and fully described in said “further defense,” purported to be a chattel mortgage on property described as “two log buildings situate on Little Eldorado Creek, in the Fairbanks Precinct, Territory of Alaska, and on all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, save and except a line of goods purchased from Sargent & Pinsky, which consists of miners’ wearing apparel,” the said property being all the property then owned and possessed by said A. M. Ohlsen; that a part of the merchandise therein described was afterwards seized under the writ of attachment in case No. 1095, which action and the property taken under said attachment are fully described in paragraph 2 of the amended complaint; that by the terms of said pretended chattel mortgage, the said Ohlsen was to remain in possession of the stock of goods, wares and merchandise referred to therein, sell the same in the usual course of trade, and replenish the stock with new goods from time to time, such new goods to be paid for by said Ohlsen out of the proceeds of sales of the goods, or were to be supplied by said Peter Vachon, and such new goods, when purchased, to be mingled with the old stock and to be subject to the pretended lien of said mortgage; but plaintiff avers that the description of the mortgaged property contained in such pretended chattel mortgage was not

sufficiently definite to enable a third person to identify the same therefrom; that after the date of said pretended chattel mortgage and up to the time of the levy of said writ of attachment on August 27th, 1908, the said A. M. Ohlsen continued in the possession of said personal property, sold the [28A] same in the usual course of mercantile business, and from time to time bought new goods and paid therefor from the proceeds of sales of the goods described in said pretended chattel mortgage, and mingled said new goods indiscriminately with said old stock; that by the express terms of said pretended chattel mortgage the same was made to secure a debt of \$3,852.07 due from said A. M. Ohlsen to Peter Vachon and a debt of \$1,350.00 due from said Ohlsen to R. H. Miller & Co., of Chena, Alaska, and it was provided therein that payments out of the proceeds of sales of goods were to be made by said Ohlsen to Peter Vachon, and by him credited and paid out *pro rata* to himself and said R. H. Miller & Co.; that said pretended chattel mortgage was executed by the parties thereto for the purpose and with the effect of withdrawing the property of said A. M. Ohlsen from the reach of his creditors, of whom plaintiff was one, and was made with the intent to hinder, delay, and defraud the creditors of said A. M. Ohlsen in this: That it gave an unlawful preference to two of the creditors of said Ohlsen, viz.: Peter Vachon and R. H. Miller & Co.; that by reason of the premises said pretended chattel mortgage was and is void; that the A. M. Ohlsen referred to in said amended answer and the Alfred M. Ohlsen men-

tioned in the amended complaint is one and the same person.

For a second defense of new matter by way of reply to that part of the amended answer on page 2 and designated, "For a further defense to this action," etc., plaintiff says: That the undertaking referred to therein was freely and voluntarily executed by defendants for the purpose of securing the release of possession by the marshal of said division of the stock of goods attached in case No. 1095, entitled *The Ross-Higgins Co. vs. Alfred M. Ohlsen*, and described in paragraph 2 of the amended complaint; that such purpose was accomplished thereby, and the said attached goods were turned over by said marshal to Peter Vachon, the claimant; that neither said Vachon nor these defendants appeared in said cause No. 1095 and none of them made any objections therein to the regularity or legality of the said writ of attachment nor the levy thereof, nor did either or any of them in said action make any claim in any manner that said A. M. Ohlsen was not the [29] owner of said attached property, but, on the contrary, by the execution of such forthcoming bond and by such failure to appear and litigate those questions in said cause No. 1095 defendants and said Peter Vachon waived all objections to the regularity and legality of said writ and the levy thereof and the ownership of the said attached property, and by such failure to appear in said action No. 1095 conceded and acknowledged the regularity and legality of the writ of attachment and the levy thereof, and that the ownership of the attached property was

in the said A. M. Ohlsen; that these defendants are estopped in this action to raise or litigate any of the questions above referred to; that the A. M. Ohlsen mentioned in said supposed third defense of the amended answer is the same person who is named in the amended complaint as Alfred M. Ohlsen.

WHEREFORE, plaintiff prays judgment as in its amended complaint.

LOUIS K. PRATT,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Louis K. Pratt on oath says: That he is the attorney for plaintiff herein, a foreign corporation; that this action is based on the forthcoming bond given by the defendants in connection with attachment proceedings in the case No. 1095 on the records of this court entitled: "The Ross-Higgins Company, a corporation, plaintiff, against Alfred M. Ohlsen, doing business in the name of the Fox Trading Company, defendant," in which last-mentioned case affiant was attorney for the plaintiff therein; that the bond in this action provides for the delivery of attached property or the direct payment of the value of the said property in money, which said bond is now in the files of said court in the said cause No. 1095; that he has read the foregoing reply and knows the contents thereof, and the same are true as he verily believes.

LOUIS K. PRATT.

Subscribed and sworn to before me this 25th day of October, 1917. [30]

[Seal]

L. R. GILLETTE,

Notary Public, Territory of Alaska.

My commission expires Aug. 3, 1921.

Due service of the foregoing reply by copy thereof acknowledged this 26th day of October, 1917.

A. R. HEILIG,

Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 26, 1917. J. E. Clark, Clerk. By Frank B. Hall, Deputy. [31]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-second Court Day.

Thursday, May 1, 1919.

Trial by the Court.

Now, on this day, this cause came on regularly for trial before the Court, respective counsel having stipulated to waive trial by jury, Louis K. Pratt appearing as counsel for the plaintiff, and A. R. Heilig appearing as counsel for the defendants, and both sides announcing themselves ready for trial, the following proceedings were had, to wit:

Opening statement was made by Louis K. Pratt, counsel for plaintiff.

Statement was made by A. R. Heilig, counsel for defendants.

Upon motion of counsel for defendants, the defendants are permitted to amend the third further defense in the amended answer by adding the words and figures "excepting \$603.92" after the word "unpaid" in the 24th line thereof.

Plaintiff's Exhibits "A" (judgment-roll in cause No. 1095), "B" (writ of attachment and return in No. 1095), "C" (certified copy of articles of incorporation), "D" (certified copy annual statements), and "E" (certified copy of articles of incorporation, etc.,) were each duly offered, marked, and admitted in evidence.

At 11:40 A. M., Court declared recess until 2 P. M.

2 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed. [32]

Alfred M. Ohlsen and Frank B. Hall were each duly sworn in the order named and testified in behalf of the plaintiff.

Plaintiff rests.

Frank B. Hall was recalled to the stand and testified in behalf of the defendants.

Defendants' Exhibit No. 1 (annual statement) was duly offered, marked, and admitted in evidence.

Peter Vachon was duly sworn and testified in behalf of the defendants.

Defendants' Identification No. 1 (certified copy of mortgage) was duly marked therefor.

At 3:55 P. M., Court declares recess until 4:10 P. M.

4:10 P. M.

And now, respective counsel being present as heretofore, the trial of said cause was resumed.

Peter Vachon resumed the stand and testified further in behalf of the defendants.

At 5:P. M. Court adjourned until 10:A.M, Friday, May 2, 1919.

CHARLES E. BUNNELL,
District Judge. [33]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-third
Court Day.

Friday, May 2, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial before the Court, and respective counsel being present as heretofore, the trial of cause was resumed.

Peter Vachon resumed the stand and testified further in behalf of the defendants.

Alfred M. Ohlsen was recalled to the stand and testified in behalf of the defendants.

At 10:50 A. M., Court declares recess until 2:00 P. M.

2:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Peter Vachon was recalled to the stand and testified further in behalf of the defendants.

Defendants' Identifications No. 2 (letter) and No. 3 (letter) were each duly marked therefor.

L. B. Clough was duly sworn and testified in behalf of the defendants.

Peter Vachon was recalled to the stand and testified further in behalf of the defendants.

Defendants rest.

F. C. Wiseman was duly sworn and testified in behalf of the plaintiff in rebuttal.

Defendants' Identification No. 4 (certified copy of writ [34] of attachment) was duly marked therefor.

M. O. Carlson was duly sworn and testified in behalf of the plaintiff in rebuttal.

Plaintiff's Exhibit "F" (certified copy of affidavit for renewal of chattel mortgage) was duly offered, marked, and admitted in evidence.

Plaintiff's Identification No. 1 (original answer in cause No. 1624) was duly marked therefor.

Plaintiff rests.

Defendants rest.

At 3:15 P. M., the trial of this cause was continued until 2:00 P. M., Tuesday, May 6, 1919.

CHARLES E. BUNNELL,
District Judge. [35]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-fifth
Court Day.

Tuesday, May 6, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial, Louis K. Pratt appearing on behalf of the plaintiff, and A. R. Heilig appearing on behalf of the defendants, and the trial of said cause was resumed.

Argument at this time to the Court was waived by Louis K. Pratt, counsel for plaintiff.

Argument was had by A. R. Heilig, counsel for defendants.

At 5:00 o'clock P. M., the trial of this cause was continued until 10:00 A. M., Wednesday, May 7, 1919.

CHARLES E. BUNNELL,
District Judge. [36]

[Title of Court and Cause.]

General March, 1919, Term—Thirty-sixth
Court Day.

Wednesday, May 7, 1919.

Trial (Continued).

Now, on this day, this cause came on again regularly for trial, and respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was contained by A. R. Heilig, counsel for defendants.

Argument was had by Louis K. Pratt, counsel for plaintiff.

At 11:30 A. M., Court declared recess until 2:00 P. M.

2:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was continued by Louis K. Pratt, counsel for plaintiff.

At 3:50 P. M., Court declared recess until 4:00 P. M.

4:00 P. M.

And now respective counsel being present as heretofore, the trial of said cause was resumed.

Argument was continued by Louis K. Pratt, attorney for plaintiff.

Whereupon the Court took the matter under advisement and reserved decision.

CHARLES E. BUNNELL,
District Judge. [37]

[Title of Court and Cause.]

General March, 1919, Term—Seventy-third
Court Day.

Thursday, February 26, 1920.

Decision.

This cause having heretofore been heard and the Court having taken the matter under advisement

and reserved its decision and rulings as to the admission of certain evidence, now, at this day, the plaintiff appearing by Louis K. Pratt, its attorney, and the defendants appearing by A. R. Heilig, their attorney, the Court admits in evidence and orders filed as Plaintiff's Exhibit "G," the document heretofore offered herein as Plaintiff's Identification No. 1, and admits in evidence and orders filed as Defendants' Exhibits No. 2 to No. 5, respectively, the documents heretofore offered herein as Defendant's Identifications No. 1 to 4. Thereupon the Court filed its written decision herein and directed that counsel prepare findings of fact and conclusions of law and judgment in accordance therewith.

CHARLES E. BUNNELL,

District Judge. [38]

[Title of Court and Cause.]

Decision.

The plaintiff, an Oregon corporation, seeks to recover from the defendants the sum of \$1,404.85, together with interest thereon at the rate of 8% per annum from January 9, 1911. The complaint was filed April 17, 1911. By its amended complaint the plaintiff alleges its corporate existence and a compliance with specific acts upon its part under the provisions of the Compiled Laws of Alaska to give the Court jurisdiction. The plaintiff further pleads that in action Number 1095 in this Court wherein the said corporation was plaintiff and one Alfred M. Ohlsen, doing business in the name of

The Fox Trading Company, was defendant, plaintiff attached a stock of merchandise and fixtures belonging to the said Ohlsen of the value of \$1900, which said merchandise and fixtures having been claimed by one Pete Vachon, the defendants herein, Protzman and Gordon, executed to the United States Marshal, H. K. Love, a redelivery or forthcoming bond to procure the release of said attached property, engaging "to redeliver the said attached property or pay the value thereof to the United States Marshal to whom execution upon a judgment obtained by plaintiff in said action may be issued"; that the plaintiff obtained judgment in cause No. 1095 on January 9, 1911, in the sum of \$1,404.85 and a decree foreclosing the plaintiff's attachment lien upon the property described and ordering the same sold to satisfy the judgment; that special execution duly issued, was returned wholly unsatisfied; and that said bond was assigned by the said H. K. Love to plaintiff herein.

The defendants answering deny the allegations of the complaint [39] conferring jurisdiction, the levy of the writ of attachment, the foreclosure of the attachment lien, and that the value of the stock of merchandise and fixtures was of a greater sum than \$1300. Affirmatively the defendants plead:

"That on the 18th day of July, 1906 and continuously thereafter, the principal place of business in Alaska of said corporation was at Fairbanks, Alaska; that the object of action No. 1095 described in paragraph II of said complaint, brought by plaintiff herein against A. M. Ohlsen, was to recover a debt due by said

Ohlsen to plaintiff for merchandise sold at Fairbanks, Alaska, by said plaintiff to said Ohlsen; that at no time did plaintiff file in the office of the Clerk of the District Court for the Third, now Fourth Judicial Division of Alaska, at Fairbanks, a duly authenticated copy, or any copy whatever, of its charter or articles of incorporation as required by law, and by reason of its failure so to do the contract sued upon in this action is void."

That at the time of the attempted execution of the writ of attachment the property described did not belong to A. M. Ohlsen.

That said property at the time of the issuance of the writ of attachment and attempted levy was subject to the lien of a chattel mortgage given by the said Ohlsen to Peter Vachon, and that the United States Marshal, though having actual knowledge of the facts, failed to comply with the provisions of the law relative to attaching mortgaged personal property.

Issue having been joined the case was tried to the Court without a jury.

Concerning the facts there is little dispute. The plaintiff is a foreign corporation organized under the laws of Oregon. March 2, 1901, it filed with the Secretary of Alaska a certified copy of its articles of incorporation, together with financial statement, designation and consent of agent as required under the provisions of chapter 23, Title III, Civil Code of Alaska (sec. 654, Compiled Laws of Alaska). It also filed with the Secretary of Alaska annual

statements for the years 1903, 1904, 1905, and 1906. It filed with the clerk of the court for the First Judicial Division at Juneau, September 28, 1900, a certified copy of its articles of incorporation, together with financial statement, designation and consent of agent. Its annual statements for the years 1903, 1904, and 1905, filed with the clerk of the court at Juneau designate Skagway in the First Judicial Division as its principal [40] place of business in the Territory. It did business at Fairbanks, Alaska, during the year 1906 and for a part of the year 1907, and in its annual statement for the year 1906 filed with the clerk of the court for the Third (now Fourth) Judicial Division, it designates Fairbanks as its principal place of business in the Third Judicial Division. It did not file with the clerk of the court for the Third Judicial Division a certified copy of its articles of incorporation or any other statement required by law except its annual statement for the year 1906. It closed its business at Fairbanks in September, 1907.

August 20, 1908, the plaintiff brought an action for debt, No. 1095, in this court against Alfred M. Ohlsen, doing business in the name of the Fox Trading Company. Issue was joined and such proceedings were had that on January 9, 1911, judgment was rendered for the plaintiff in the sum of \$1,367.50 and costs amounting to \$37.35. A writ of attachment having issued, the United States Marshal on August 27, 1908, levied upon a stock of merchandise and fixtures and two log cabins, personal property of the defendant. Omitting the cap-

tion, lists of property, and statement concerning debts attached, the Marshal's return is as follows:

"I hereby certify that I received the within writ of attachment on the 26th day of August, A. D. 1908, and executed the same at Little Eldorado Creek, Alaska, on the 27th day of August, A. D. 1908, by attaching all of the within defendant's right, title and interest in and to, those two log cabins on 3 above, creek claim, Little Eldorado Creek, Alaska, used by the Fox Trad. Co., and the stick of merchandise in said cabins and warehouse on said claim, a list of the same is hereon attached and made part of this return, by leaving a certified copy of this writ, together with a notice specifying the property attached with the within defendant Alfred M. Ohlsen and by taking possession of the said stock of merchandise, the same not being moved, nor a keeper put in charge of said merchandise by instructions of the plaintiff's attorney.

Dated at Dome, Alaska, this 27th day of August, A. D. 1908.

GEO. G. PERRY,
U. S. Marshal,
F. C. WISEMAN,
Deputy."

The defendants herein executed on September 6, 1908, the following bond, with usual affidavit of justification:

"Whereas the above-named plaintiff commenced an action in the District Court for the

Territory of Alaska, Third Division, against the above-named defendant, claiming that there was due to said plaintiff from said defendant the sum of fifteen hundred [41] eighty-nine dollars and seventy-two cents, together with eight per cent per annum interest from January 1, 1908, and thereupon an attachment issued against the property of the defendant as security for the satisfaction of any judgment that may be recovered therein and certain property and effects claim to be the property of the said defendant has been attached and seized by the United States Marshal for the Third Division of the Territory of Alaska, under and by virtue of the said writ; and

Whereas Peter Vachon, at the time and before the commencement of this suit, and at the time and before the levy of said writ, had a chattel mortgage upon all of said property so attached, which said mortgage is dated the 8th day of April, 1908, and made by A. M. Ohlsen to Peter Vachon, which said mortgage was recorded on the 9th day of April, 1908, at 20 minutes past 12 noon, and recorded in Vol. 2 of Chattel Mortgages in the office of the Recorder of the Fairbanks Recording District, Territory of Alaska, and which said mortgage and the amount due thereon and secured thereby has not been paid, nor any portion thereof, and the said mortgage at the time of the commencement of said action and the issuance of said writ and the levy upon said property was in full force

and effect and is now in full force and effect, and the said Peter Vachon is the owner and holder of the note secured by said mortgage, and the owner of said mortgage, and was at the time of the commencement of said action and issuance of said writ and the levy upon said property, and claims the said property by virtue of said chattel mortgage.

Now, therefore, we, the undersigned, residents of the Territory of Alaska, in consideration of the premises and in consideration of the delivery of the said property to the said Peter Vachon do hereby jointly and severally undertake in the sum of two thousand dollars and promise and engage to redeliver the said property or pay the value thereof to the said United States Marshal to whom execution upon a judgment obtained by plaintiff in said action may be issued.

L. F. PROTZMAN. (Seal)

F. S. GORDON. (Seal)

Witnesses:

W. F. WHITELY.

J. S. STERLING.

April 8, 1908, the said Alfred M. Ohlsen duly made and executed to Peter Vachon a chattel mortgage to secure the payment of certain notes therein set forth and amounting to the sum of \$3,852.04 upon the following described personal property:

“One log building, 20x21 feet; one log building 20x17 feet adjoining and used as a store; and warehouse 12x16 feet, frame with tar-paper

roof, together with the land occupied with the same and a reasonable space around them for the convenient use and occupation thereof, which said buildings are situate upon creek claim number three above discovery on Little Eldorado Creek, in the Fairbanks Recording District, Territory of Alaska; the said buildings now being actually used by the party of the first part in the carrying on of his said business.

Also, all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, safe and except a line of goods purchased from Sargent and Pinska which consists of miner's wearing apparel."

Renewal affidavit was filed with the commissioner for the Precinct on March 20, 1909.

By the terms of the mortgage the mortgagor was to remain in [42] possession of the aforesaid chattels, continue his mercantile business, replenish his stock from time to time and after deducting the expense incident to maintaining the business account to the mortgagee for the proceeds. The mortgage also contains the provision:

"It is further mutually understood and agreed between the parties hereto that, whereas the party of the first part is indebted to R. H. Miller & Co., of Chena, Alaska, in the sum of Thirteen Hundred and Fifty Dollars for goods, wares, and merchandise sold by the said R. H. Miller & Co. to the party of the first part; and

Whereas it has been agreed that the said

R. H. Miller & Co. is to share *pro rata*, according to their respective claims, with the party of the second part in the net proceeds realized from the sale of the goods as hereinbefore provided;

Now, therefore, it is agreed between the party of the first part and the party of the second part, that the party of the second part is to turn over of moneys received by him from the sale of goods, as heretofore provided, to R. H. Miller & Co. that proportion of the net proceeds as the claims of the said R. H. Miller and the party of the second part shall bear to each other."

The instrument was acknowledged by the mortgagor and both the mortgagor and mortgagee made affidavit of good faith as required by law. I find the value of the chattels attached to be the sum of \$1,900. The defendants Protzman and Gordon I find to be privies of Vachon and not of Ohlsen as contended by plaintiff.

Under the act of June 6, 1900, 31 Stat. L. 528-529, Congress enacted a law for the Territory on the subject of foreign corporations. Section 654 provides:

"Sec. 654. All corporations or joint stock companies organized under the laws of the United States, or the laws of any State or Territory of the United States, shall, before doing business within the District, file in the office of the Secretary of the District and in the office of the clerk of the District Court for the division wherein they intend to carry on busi-

ness, a duly authenticated copy of their charter or articles of incorporation, and also a statement, verified by the oath of the president and secretary of such corporation, and attested by a majority of its board of directors, showing—

(1) The name of such corporation and the location of its principal office or place of business without the District; and, if it is to have any place of business or principal office within the District, the location thereof;

(2) The amount of capital stock;

(3) The amount of its capital stock actually paid in money;

(4) The amount of its capital stock paid in in any other way, and in what;

(5) The amount of the assets of the corporation, and of what the assets consist, with the actual cash value thereof;

(6) The liabilities of such corporation, and if any of its indebtedness is secured, how secured, and upon what property. [43]

Such corporation or joint stock company shall also file, at the same time and in the same offices, a certificate, under the seal of the corporation and the signature of its president, vice-president, or other acting head, and its secretary, if there be one, certifying that the corporation has consented to be sued in the Courts of the District upon all causes of action arising against it in the District, and that service of process may be made upon some person, a resident of the District, whose name and place of

residence shall be designated in such certificate, and such service, when so made upon such agent, shall be valid service on the corporation or company, and such agent shall reside at the principal place of business of such corporation or company in the District."

Section 655 provides for the filing of the written consent of the agent designated. Section 656 has to do with filling a vacancy in the office of agent.

Section 657: "If any such corporation or company shall attempt or commence to do business in the District without having first filed said statements, certificates, and consents required by this chapter, it shall forfeit the sum of twenty-five dollars for every day it shall so neglect to file the same; and every contract made by such corporation, or any agent or agents thereof, during the time it shall so neglect to file such statements, certificates, or consents, shall be voidable at the election of the other party thereto. It shall be the duty of the United States attorney for the District to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States."

Section 658. "Every such corporation or company shall annually, and within thirty days from the first day of July of each year, make a report, which shall be in the same form and contain the same information as required in the statement mentioned in section six hundred and

fifty-four of this chapter, which report shall be filed in the office of the Secretary of the District, and a duplicate thereof in the office of the Clerk of the District Court for the Division wherein the business of the corporation is carried on."

Section 659 gives existing corporations ninety days within which to comply with the law.

Section 660: "If any such corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the District shall be void as to the corporation or company and no Court of the District, or of the United States, shall enforce the same in favor of the corporation or company so failing."

An application of the law to the facts in this case obviously depends upon the correct interpretation of sections 657 and 660 above quoted. Under statutes of similar purport the authorities are in hopeless conflict. It is not because the statutes are in ambiguous phraseology or because their purpose can not be readily understood, but because one's sense of justice is challenged by the proposition [44] that a debtor can avoid payment of a just debt because his creditor, a foreign corporation, has failed to comply with the law and therefore is not permitted to maintain an action in the Courts to collect the same. Mr. Thompson, the author of the subject entitled, "Foreign Corporations," in 19 Cyc. 1298, speaks of the "shocking immorality" of such a proposition. The purpose of the law is not to

relieve a debtor from the payment of his just debt, but in furtherance of public policy to compel the unknown artificial person to disclose its identity, to the end that the citizens of the State may know its financial status and under what laws it is organized. For the State to require less would be to require nothing at all.

The statute in question is clear, plain, unambiguous and unequivocal. "Voidable" in section 657 does not make "void" in section 660 mean "voidable," nor does "void" in section 660 make "voidable" in section 657 mean "void." Section 657 has first of all to do with the matter of penalty for a failure to comply with the law. Incidentally, it says that during the time a foreign corporation shall neglect to file the required statements, its contracts shall be voidable at the election of the other party thereto. Voidable means capable of being avoided or of being adjudged void. As between the parties then, the foreign corporation not having complied with the law is not permitted to maintain that the contract is valid if the other party elects to claim it is voidable. As long as the other party treats the contract as valid, the corporation can receive and retain the fruits thereof, and the other party obviously cannot, in the case of a payment on account, recover any such payment by an action in Court, for it has at its election treated the contract as valid. Section 660 logically follows the provisions of section 657, for if the foreign corporation by failure to comply with the law is in the position that it has made a contract with another party and

said other party can at its election declare the contract void, of what purpose would it be to permit the foreign corporation to maintain an action in court? True, upon action being brought, the other party might come into court and elect to declare the contract valid, but that is simply to indulge in speculation. [45] The statute says to the foreign corporation that so far as judicial inquiry is concerned when it is shown that it has not complied with the law its contracts shall be void, and that no court of the District or of the United States shall enforce the same in favor of the corporation or company so failing. It is a positive mandatory inhibition and under a fair interpretation of the law is incapable of any other construction.

It is argued that the business conducted at Fairbanks was a branch of the Skagway business. The annual statement for the year 1906, which by the way was not filed with the clerk of the court until August 14, 1906, more than thirty days after the 1st of July, designates Fairbanks as its principal place of business in the Territory. But whether or not it is a branch store is immaterial, for it was doing business in the Third Judicial Division and had not complied with the law with reference thereto. Also it did not file any annual statement for the year 1907, though the record shows it was in business in said Division more than thirty days after July 1st of said year.

The tendency of practically all recent decisions is to require foreign corporations to comply with the plain provisions of the law. A compliance with the

law by a foreign corporation is a condition precedent to the right to do business in another state. If it fails to comply with the law, then in furtherance of public policy it may not maintain an action to enforce its contracts.

Cyclone Mining Co. vs. Baker L. & P. Co.,
165 Fed. 996.

La Moine Lumber & Trad. Co. vs. Kesterson
et al., affirmed in 193 Fed. 355, 171 Fed. 980.

National Mercantile Co. vs. Watson Corp.
Comr. et al., 215 Fed. 929.

Empire M. & M. Co. vs. Tombstone M. & M.
Co., 100 Fed. 910.

Hammer vs. Garfield Mining Co., 130 U. S.
297.

Bradford Co. vs. Dunn, 176 N. Y. S. 834.

Amos D. Bridges Sons, Inc., vs. State, 177
N. Y. S. 3.

Republic Rubber Co. vs. Adams, 213 S. W.
80.

Hayes vs. West Virg. Oil, Gas & By. Prod.
Co., 210 S. W. 174, 12 R. C. L., page 81.

Phoenix Nursery Co. vs. Trostel, 164 N. W.
995.

It necessarily follows that the judgment in No. 1095 was void and all proceedings had by virtue of attempts to attach the defendant's [46] property were likewise void. The question was properly raised by the pleading.

At page 575, Volume I of Shinn on Attachment, the author says:

“But the jurisdiction of the Court in making such attachment may be denied by the obligors under proper pleading in an action on the bond given for the release of the attached property, brought after judgment against the defendant in the attachment suit.”

Likewise, in 2 R. C. L., page 890, it is stated:

“In some cases, however, it has been held that the obligors are not precluded from attacking the attachment proceedings in the case wherein the attachment issued, and the obligors are entitled to show that the attachment proceedings are wholly void because of fraud, collusion, or the like.” Citing: 32 L. R. A. (N. S.) 404—407, 29 Pac. 851.

In 6 C. J. 353 it is stated:

“Objections on behalf of the surety on a bond to release attached property, which go to the jurisdiction of the Court in the attachment suit to issue the attachment, are available to defeat liability on the bond.”

The same principle is applied and for the same reasons where execution is issued upon a void judgment. The judgment is open to either direct or collateral attack.

17 R. C. L., page 247.

Olson vs. Nunnally, 28 Pac. 149.

15 R. C. L., page 855.

Lawlor vs. Merritt, 72 Atl. 143.

Kastner vs. Benz, 73 Pac. 68.

Kelso vs. Norton, 87 Pac. 185.

Pac. Nat'l Bank, 124 U. S. 721.

Freeman on Executions, pages 1484, 1485.

In the present case not only was the Court without jurisdiction in making the attachment and entering judgment in No. 1095, but requiring a bond to be executed to the marshal by the claimant Vachon before releasing the property was in fact a fraud.

Deputy Marshal Wiseman, according to his return, attached the property described and took it into his possession, but he did not move it, neither did he place a keeper in charge of it. His failure to retain possession was "by instructions of plaintiff's attorney." Under such a state of facts no bond to release the property could be of any force and effect, for the property had already been released, and requiring a bond to release property that had already [47] been released was a fraud upon the claimant as well as upon the sureties who executed the bond.

The chattel mortgage, though valid as between the parties, must be held fraudulent as to creditors. Assuming that the mortgagor under the terms of the mortgage could remain in possession of the mortgaged chattels and continue the business, replenish the stock, and, after deducting the expense, account to the mortgagee, still under none of the authorities could the mortgage be held valid as to creditors, when it appears that a creditor not a party to the mortgage is a beneficiary. In this case, under the terms of the mortgage, R. H. Miller & Co. were to participate with the mortgagee *pro rata* in the proceeds, and no one for and on behalf of R. H. Miller & Co. made the required affidavit of good

faith. The debt due R. H. Miller & Co. had not been assigned to Peter Vachon, nor had Vachon assumed the debt, so the rule announced in *Noyes et al. vs. Ross et al.*, 59 Pac. 367, does not apply.

Findings of fact and conclusions of law in accordance with the views herein expressed may be prepared and submitted.

Dated at Fairbanks this 26th day of February, 1920.

CHARLES E. BUNNELL,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 26, 1920. H. Claude Kelly, Clerk. By John E. Pegues, Deputy. [48]

[Title of Court and Cause.]

Objections to Defendants' Proposed Findings of Fact and Conclusions of Law and Requests for Eliminations, Substitutions, Corrections and Additions.

1st. The plaintiff objects that the proposed findings of fact tendered herein by defendants make no reference whatever to the pleadings and the issues raised thereby in this case, No. 1624, or the evidence produced at the trial thereof, which trial took place before the Court without a jury on May 1st and 2d, 1919, except that the finding marked "II" *does* copy and refer to a chattel mortgage introduced in evidence by the defendants.

2d. The plaintiff objects to the proposed find-

ing of fact No. I, and asks that it be stricken out, for the reason that the matter therein contained is not within the issues made by the pleadings and evidence in this case No. 1624 and has no reference thereto in any sense and would only be appropriate (if at all) as a part of a finding of fact in case No. 1095 on the records of this Court, entitled "The Ross-Higgins Company, Plaintiff, versus Alfred M. Ohlsen." It is difficult, however, to see how it could have been a proper finding in case No. 1095, that action being on a promissory note, the consideration of which was not questioned and in which the capacity of plaintiff company to sue was not attacked.

3d. The plaintiff objects to that part of the findings of fact under Roman numerals II and especially that part commencing at the top of page 9, and continuing to paragraph III for the reason that the statements found on said page 9 are inaccurate and untruthful in that they represent that Alfred M. Ohlsen, the mortgagor, [49] out of the proceeds of the sale of goods from April 8th, 1908, the date of the alleged mortgage to August 27th, 1908, the date of the levy of the attachment, paid over to Peter Vachon *all* thereof except small amounts for making change, whereas the evidence showed conclusively that during that period the said Ohlsen paid to R. H. Miller & Company named in said supposed chattel mortgage at least \$100.00 out of the proceeds of sales of said goods, and that he did so in conformity to his contract with said R. H. Miller & Company as contained in said instrument.

The plaintiff requests that in addition to the correction above outlined, the following may be added to said paragraph II.

“That said chattel mortgage was not verified as to the good faith thereof by said R. H. Miller & Company either by a member thereof or by any other person on behalf of said company. That between April 8th, 1908, the date of said chattel mortgage and the 27th day of August, 1908, the date of the levy of the attachment in cause No. 1095, entitled Ross-Higgins Company versus Alfred M. Ohlsen, the latter as mortgagor, pursuant to his agreement contained therein with said R. H. Miller & Company, paid to that firm out of the proceeds of sales of the merchandise described in said chattel mortgage, at least as much as \$100.00 in cash.”

4th. The plaintiff asks that finding of fact No. III commencing on page 9 be repudiated altogether and stricken out, and that the ones given below be substituted therefor because said finding No. III is inconsequential, in that it does not cover the pleadings and evidence in this case No. 1624, but does set out or attempts so to do, some of the facts connected with case No. 1905 on the records of this Court and entitled Ross-Higgins Company versus Alfred M. Ohlsen, but even as to that case is palpably inaccurate. The plaintiff offers the following substitutions and additions to wit: (The Nos., however, should be “I,” “II” and “III” and not “III.”)

I.

“That the plaintiff, The Ross-Higgins Company, was a foreign corporation [50] organized under

the laws of Oregon and was authorized by its articles of incorporation to engage in the mercantile business; that in the years 1900 and 1901 it filed in the offices of the Territorial Secretary and with the Clerk of the District Court for the First Division at Juneau, Alaska, a certified copy of its articles of incorporation, a financial statement, consent to be sued in the Courts of the Territory, and the appointment of an agent upon whom service of process might be made in Alaska and his consent so to act, which said articles of incorporation designated Skagway in said First Division as the principal place of business of said corporation; that for the years 1903, 1904, 1905 and 1906 said company filed with said Territorial Secretary its annual financial statement as required by Chapter 23, Compiled Laws of Alaska and the same statements with the Clerk of the District Court, First Division at Juneau, for the years 1903, 1904 and 1905 and with the Clerk of the District Court, Third now Fourth Division at Fairbanks, its annual statement for the year 1906, in which last mentioned statement said company designated Fairbanks as its principal place of business; that said company did not at any time file with the Clerk of the Court at Fairbanks, certified copies or any copies of its articles of incorporation, consent to be sued in the Courts of the Territory of Alaska, the appointment of an agent upon whom service of process could be made in Alaska and the consent of such agent to act in that capacity; that said company carried on a mercantile business at Skagway, Alaska, in the First Divi-

sion from and including the year 1900 until the spring of 1906, and from the latter date till about September 1st, 1907, at Fairbanks, Alaska; that said company closed out and ceased to do a mercantile business in Alaska under said articles of incorporation by or before September 1st, 1907, and thereafter did not engage in any business of any nature in Alaska except such as was necessary or proper in connection with the payment of bills and collection of debts arising from its previous mercantile transactions."

II.

"That on August 19th, 1907, one Alfred M. Ohlsen was indebted to it in the sum of \$1689.72 for merchandise sold to him before that date [51] and on that day executed and delivered to said company his promissory note for said amount as evidence of his said indebtedness; that thereafter and on August 20th, 1908, the plaintiff commenced an action in said court on said promissory note numbered on the records thereof 1095 and entitled "The Ross-Higgins Company, Plaintiff, a Corporation versus Alfred M. Ohlsen, Defendant," in connection with which and at the commencement whereof said plaintiff filed an affidavit in attachment and an attachment bond, both of which were in proper form and substance and in all respects regular and legal on which the clerk of said Court issued a writ of attachment in due and legal form, which writ of attachment was delivered to the marshal of the Third, now Fourth, Division of Alaska, for service; that said marshal sent said writ for service to Frank

C. Wiseman, one of his deputies, whose headquarters and residence were at that time at Dome City on Dome Creek, about two and a half miles distant from the store and place of residence of the defendant Alfred M. Ohlsen on Little Eldorado Creek; that on August 27th, 1908, said Deputy Marshal Wiseman went to Little Eldorado Creek and levied said writ of attachment on all the right, title and interest of Alfred M. Ohlsen, defendant, the owner thereof in and to two log cabins, one used as a store building and the other as a warehouse, both in close proximity, with the stock of merchandise contained in said cabins, took possession of the cabins and the stock of merchandise therein contained, made an inventory of the merchandise and under instructions from plaintiff's attorney went back to his headquarters at Dome City and did not leave a watchman in charge of the attached property; that said attached property was in no apparent danger of destruction or loss from fire, storms or from other causes; that thereafter and on September 7th, 1908, said stock of attached merchandise (a full description of which is made a part of paragraph 2 of plaintiff's amended complaint in this case No. 1624, to which reference is hereby specifically made) was claimed by one Peter Vachon under the chattel mortgage set forth in defendants' finding No. II, and in order to get the possession [52] thereof from the marshal said Vachon caused a forthcoming bond to be executed and delivered to the said marshal, under section 145 Carter's Alaska Code, with the defendants, L. F. Protzman and F. S. Gordon

as sureties (a true and complete copy of which is inserted in paragraph 2 of plaintiff's amended complaint in this action No. 1624, to which reference is hereby especially made), which bond was accepted and approved by said Marshal and by reason of the same the said marshal on that day delivered the possession of said stock of merchandise to said claimant Peter Vachon; that afterwards such proceedings were had in said case No. 1095 that on January 9th, 1911, judgment was given in this Court in favor of Ross-Higgins Company versus the said Alfred M. Ohlsen for the sum of \$1404.85, debt and costs, and a decree was entered therein foreclosing the attachment lien of plaintiff on said stock of merchandise and ordering the sale thereof, which said judgment and decree remain of record in said Court, in full force and effect, and in nowise reversed or annulled."

III.

"That on December 9th, 1910, the marshal assigned to the plaintiff Ross-Higgins Company all his right, title and interest in said forthcoming bond; and thereafter and on February 6th, 1911, plaintiff caused a special execution to issue out of said Court on said judgment and decree in said case No. 1095 and placed the same in the hands of the marshal of said Division for service who on February 27th, 1911, demanded of said Peter Vachon and his said bondsmen L. F. Protzman and F. S. Gordon, defendants in this case No. 1624, that they turn over to him said attached merchandise or pay him its value up to the amount of the judgment and accrued interest

and costs in satisfaction of said writ, which demand was not complied with and said special execution was returned unsatisfied and said judgment remains wholly unpaid; that the liability of said bondsmen became fixed by such demand and refusal on February 27th, 1911, more than three years after the Ross-Higgins Company ceased to do business in Alaska under its articles of incorporation; that thereafter and on April 17th, 1911, the plaintiff as assignee of [53] said forthcoming bond commenced this action thereon in said court to recover the amount of said judgment with accrued interest, alleging in its amended complaint, that at the date of said demand, the value of said attached merchandise was \$1900.00, which value I find to be established by the evidence."

5th. The plaintiff requests that paragraph IV of of the proposed findings of fact be eliminated on the ground that the statements therein contained are not within the issues in the case and are hence inconsequential and useless.

6th. The plaintiff asks that Conclusion of Law No. I be stricken out because the same is a combination of finding of fact and conclusion of law and fails to find all the significant facts in that connection in that it fails to find that Ohlsen paid said R. H. Miller & Company at least as much as \$100.00 out of the proceeds of the sales of merchandise during the period from April 8th to August 27th, 1908.

7th. Plaintiff asks that conclusion of law designated by the Roman numerals II be stricken out as not within the issue in view of defendants' admission in their answer by failure to deny plaintiff's

allegation in its amended complaint "that it ceased to do business in Alaska under its articles of incorporation in June or July, 1907."

8th. It asks that conclusion of law marked III be eliminated because there is no finding of fact upon which it could be based and is contrary to all the testimony.

9th. That conclusion IV be stricken out because the same is utterly unsupported by the findings and the evidence and in contradiction thereof.

10th. That conclusion V be stricken out for the reason that it is wholly unwarranted by the findings of fact and the evidence heard at the trial.

11th. That one conclusion of law be substituted for all those tendered by defendants to the effect that plaintiff is entitled to judgment for the amount prayed for in its amended complaint with costs.

LOUIS K. PRATT,

Attorney for Plaintiff. [54]

Received copy of the foregoing objections, etc.,
this 27th day of April, 1920.

A. R. HEILIG,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Apr. 27, 1920. H. Claude Kelly, Clerk. By R. H. Geoghegan, Deputy. [55]

[Title of Court and Cause.]

Findings of Fact and Conclusions of Law.

The Court having heard the evidence submitted by

plaintiff and defendants in this case and the arguments of counsel, and filed its opinion herein, does now make and file the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT.

I.

Plaintiff is a foreign corporation organized under the laws of the State of Oregon, and during the year 1906 and until September, 1907, carried on a mercantile business in Alaska, and during said period its principal place of business in Alaska was in the Town of Fairbanks, in the then Third (now Fourth) Judicial Division thereof; that during said period said corporation from time to time sold and delivered to one Alfred M. Ohlsen goods, wares and merchandise and received payments thereon on account so that, in August, 1907, said Ohlsen was indebted to said plaintiff in the sum of \$1,689.72; that said Ohlsen conducted a retail mercantile establishment on Little Eldorado Creek about twenty-five miles from Fairbanks.

II.

That prior to April 7, 1908, Peter Vachon was engaged in the mercantile business in Fairbanks, Alaska, and had sold to said Alfred M. Ohlsen goods, wares and merchandise and received payments on account thereof so that, on April 7, 1908, said Ohlsen was indebted to said Vachon in the sum of \$1,418.92; that on said last-mentioned date said Ohlsen requested said Vachon to sell him more goods, which Vachon agreed to do upon condition that said Ohlsen [56] would give him (Vachon) a mortgage upon all

his goods including those then to be sold; that thereupon said Vachon sold and delivered to said Ohlsen goods to the value of \$2,433.15, whereupon said Ohlsen executed and delivered to said Vachon a mortgage of which the following is a copy:

CHATTEL MORTGAGE.

This Indenture made and entered into this the 8th day of April, 1908, by and between A. M. Ohlsen, doing business under the name of Fox Trading Company of the Fairbanks Recording District, Territory of Alaska the party of the first part, and Peter Vachon, the party of the second part,

WITNESSETH:

That the party of the first part for and in consideration of the sum of One Dollar, and other good and valuable consideration to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and the extension of the time for payment of certain indebtedness, does hereby sell, assign, transfer and set over unto the party of the second part, and to his heirs and assigns forever the following described property, to wit:

One log building, 20 by 21 feet; one log building 20 by 17 feet adjoining and used as a store; and warehouse 12 by 16 feet, frame with tar-paper roof, together with the land occupied by the same and a reasonable space around them for the convenient use and occupation thereof, which said buildings are situated upon Creek Claim Number Three Above Discovery on Little Eldorado Creek, in the Fairbanks Recording District, Territory of Alaska; the said

buildings now being actually used by the party of the first part in the carrying on of his said business. Also all goods, wares, merchandise, store fixtures, mining tools and implements now contained and being in said buildings, save and except a line of goods, purchased from Sargent and Pinska which consists of miner's wearing apparel.

To have and to hold unto the party of the second part and to his heirs and assigns forever. [57]

This indenture is intended as a mortgage to secure the payment of certain indebtedness now owing by the party of the first part to the party of the second part, and which is evidenced by six promissory notes of even date with this instrument, and which are of the following tenor and purport:

\$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before May 15th, 1908, after date, for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,

\$1500.00. Fairbanks, Alaska, April 8th, 1908.

On or before June 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Fifteen Hundred Dollars in lawful money of the United States with interest thereon

after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,
\$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before June 15th, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorney's fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,
\$500.00. Fairbanks, Alaska, April 8th, 1908.

On or before July 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Five Hundred Dollars in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN,
\$425.00. Fairbanks, Alaska, April 8th, 1908.

On or before July 15th, 1908, after date for value received, I promise to pay to the order of Peter Vachon Four Hundred and Twenty-five Dollars in

lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may deem reasonable in the premises.

(Signed) A. M. OHLSEN. [58]

\$427.07. Fairbanks, Alaska, April 8th, 1908.

On or before August 1st, 1908, after date for value received, I promise to pay to the order of Peter Vachon the sum of Four Hundred and Twenty-seven Dollars and seven cents, in lawful money of the United States with interest thereon after maturity at the rate of twelve per cent per annum. And in case suit or action is instituted to collect this note or any portion thereof I agree to pay such additional sum as attorneys' fee as the Court may seem reasonable in the premises.

(Signed) A. M. OHLSEN,

This mortgage is given for the purpose of securing said notes and the whole thereof.

It is the intention of the party of the first part and the party of the second part that this mortgage shall cover all of, and the entire stock of goods, wares, merchandise, store fixtures and property of the party of the first part now in the stores and warehouses situated as hereinbefore set forth, save and except, the goods sold to the party of the first part by Sargent and Pinska as hereinbefore set forth, as well as such other stock of goods, wares, merchandise and store fixtures and property as the party of the first part may hereafter add to said stock for the purpose

of replenishing the same in order that the property hereby mortgaged may realize the largest possible amount by sale. And if at any time it may be necessary to add to or replenish said stock hereby mortgaged in order to make the same more saleable, such goods so added shall be subject to and be included in the terms of this mortgage, whether supplied by the party of the second part or any other person.

It is further agreed between the parties hereto that the party of the first part shall continue to carry on his said business, subject, however, to all of the terms and conditions of this mortgage; and he shall retain the possession of the stock of goods hereby mortgaged as well as that which may hereafter be acquired by him, and said party of the first part may sell and dispose of said stock in his usual course of business upon the following terms and conditions, to wit: The party of the first part shall keep an account of all sales made by him daily in a book kept for that purpose, and shall weekly deposit with the party of the second part all of the proceeds of the preceding weeks' sales, less such an account as [59] may be necessary for change to be kept on hand for the purpose of trade. The amount so retained to be shown by the cash-book.

That the party of the first part shall keep a full, true and correct account of all necessary expenses attending the sale of said goods, and shall make a report thereof weekly to the party of the second part.

The party of the second part is hereby given the power and right to have an agent or representative present in the stores of the party of the first part,

who may participate in the business therein, inspect the books, check up the sales of goods, and all other things that may be necessary to protect the rights of the party of the second part under this mortgage. The salary of said agent shall be borne by the party of the first part.

It is further agreed between the parties hereto that all sales of goods made by the party of the first part shall be for cash, except that upon consent of the party of the second part credit may be given to such persons and for such an amount, and for such period of time as the parties hereafter may agree upon.

It is further mutually understood and agreed between the parties hereto that, whereas, the party of the first part is indebted to R. H. Miller & Co., of Chena, Alaska, in the sum of Thirteen Hundred and Fifty Dollars, for goods, wares and merchandise sold by the said R. H. Miller & Co. to the party of the first part; and

Whereas, it has been agreed that the said R. H. Miller & Co. is to share *pro rata*, according to their respective claims, with the party of the second part in the net proceeds realized from the sale of the goods as hereinbefore provided,

Now, therefore, it is agreed between the party of the first part and the party of the second part, that the party of the second part is to turn over of moneys received by him from the sale of goods, as heretofore provided, to R. H. Miller & Co. that proportion of the net proceeds as the claims of the said R. H. Miller & Co. and the party of the second part shall bear to each other.

Time is of the essence of this agreement and strict performance [60] is essential.

If default shall be made in the payment of the principal sums mentioned in said notes, or, if the party of the first part shall fail to account for the proceeds of the sale of said stock of goods, as heretofore provided, or, if the party of the first part shall fail to perform all of the terms and conditions of this mortgage according to the true intent and meaning thereof; or, if at any time the party of the second part shall deem himself insecure; or, if the party of the first part shall attempt to remove any of the goods, wares and merchandise from the place where they are now stored, except, in the event of a sale thereof, without the consent of the party of the second part, or, if an attachment or execution, or other legal process issue against the property hereby covered by this mortgage, then and thenceforth, it shall be lawful for the party of the second part, his executors, administrators or assigns, or his authorized agent to take said goods, wares, merchandise and chattels, wherever the same may be found, and dispose of the same at public auction or private sale in bulk or in parcel, as in his judgment may realize the greatest amount; or if said second *part* may deem it advisable he may continue to sell the same at retail in the stores of the party of the first part.

All expenses incurred in the taking possession of said goods, or for the care and sale thereof, and all charges touching the same including reasonable attorneys' fees, shall be retained and deducted from the sale of said goods.

In the event that the party of the first part shall violate any of the terms or conditions of this mortgage, then the party of the second part shall deem the principal sums mentioned in all of said notes immediately due and payable; and a failure to pay any of the notes hereinbefore described at the *time shall* become due shall operate to make the remaining unpaid notes immediately due and payable; and the party of the second part may enter and take possession of the property hereby mortgaged wherever the same may be found, peaceably, if may be, or forcibly if necessary. And the party of [61] the second part is hereby authorized to call to his aid and assistance the United States Marshal for the Third Division of the Territory of Alaska to execute the power hereby given him to take possession of said property, as well as such other persons as may be found necessary.

And the United States marshal for the Third Division of the Territory of Alaska is hereby authorized upon request of the party of the second part to advertise and sell the whole or any part of the property hereby mortgaged in the manner prescribed by law for the sale of personal property on execution. The expenses of any such sale or seizure so made by the United States marshal to be deducted from the amount realized from the sale of said goods, as well as all the expense of foreclosure if made, and such expense shall include such attorneys' fee as shall be deemed reasonable in the premises.

It is further expressly agreed between the parties hereto that a failure upon the part of the party of

the first part to live up to all the terms and conditions of this mortgage shall be a default by him of the payment of the principal sums mentioned in the notes.

Upon the full payment of the principal sums in the notes herein mentioned, this mortgage shall be null and void, but until the full amount is paid it shall be of full force and virtue.

In witness whereof the party of the first part has hereunto set his hand and seal this the day and year hereinabove written.

A. M. OHLSEN. (Seal)

Witnesses:

JOHN L. McGINN.

F. W. CARTER.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this the 8th day of April, 1908, personally appeared before me A. M. Ohlsen, to me personally known and known to me to be the individual described in and whose signature is subscribed to the foregoing instrument, and he acknowledged to me that he signed, sealed and delivered the said [62] instrument freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and seal this the day and year hereinabove written.

[Seal]

JOHN L. McGINN,

Notary Public for Alaska,

United States of America,
Territory of Alaska,—ss.

A. M. Ohlsen, the mortgagor named in the foregoing instrument, and Peter Vachon, mortgagee

named in the foregoing instrument, being each duly sworn, depose and says: That the foregoing mortgage is made in good faith to secure the amounts named therein, without any design to hinder, delay or defraud creditors.

A. M. OHLSEN.
PETER VACHON.

Subscribed and sworn to before me this the 8th day of April, 1908.

[Seal]

JOHN L. MCGINN,
Notary Public for Alaska,

Which said mortgage was duly filed in the office of the Recorder of Fairbanks Precinct, Territory of Alaska, in which precinct said property was situate on said April 8, 1908; that after giving said mortgage said Ohlsen continued to sell the property covered thereby in the usual course of his business and kept an account of all sales made by him and paid to the said Peter Vachon at intervals of one or two weeks the proceeds of such sales less small amounts kept for making change, and an agent or employee of the said Vachon made frequent trips to said Ohlsen's place of business and checked up his account of sales and expenses of business and received on behalf of said Vachon such surplus as there might be, and both said Ohlsen and said Vachon continued in said method of business until about August 27, 1908, by which time \$603.92 had been paid on account of said mortgage debt.

III.

That on August 20, 1908, plaintiff herein commenced an action against the said Ohlsen upon the

claim referred to hereinbefore, and on January 9, 1911, recovered judgment thereon against said Ohlsen for \$1,404.85; that in said action plaintiff caused a writ of attachment to issue against the property of said Ohlsen, [63] and on August 27, 1908, one Frank Wiseman, then a deputy U. S. Marshal, went with said writ to the said Ohlsen's place of business and made a memorandum of the goods found in his store building and then left the store building and the goods therein contained and did not remove any part of said goods nor place any person in charge thereof and did not take any of said goods into his custody; that the value of goods of which memorandum was so made was \$1900.00; that as soon as the said Vachon learned of the issuance of said attachment, with the permission of the said Ohlsen, who was then in possession thereof, said Vachon took possession of all of the goods belonging to said Ohlsen covered by said mortgage and sold the same for the best price obtainable, which, however, was not sufficient to pay the sums due the said Vachon and secured by said mortgage.

IV.

That plaintiff did not at any time file in the office of the Clerk of the District Court for the then Third (now Fourth) Division of the Territory of Alaska, a duly authenticated copy or any copy of its charter or articles of incorporation nor any other statement required by law, excepting its annual report for the year 1906.

CONCLUSIONS OF LAW.

I.

That said mortgage from Ohlsen to Vachon was given in good faith to secure the amount therein named and was valid between said parties, but was and is invalid as against other creditors of said Ohlsen because no one made the required affidavit of good faith on behalf of R. H. Miller & Co., therein mentioned as beneficiary.

II.

That the plaintiff while carrying on business in Fairbanks, Alaska, failed to comply with the provisions of Chapter 23, Title XII of the Compiled Laws of the Territory of Alaska relating to foreign corporations, and the Court is prohibited from enforcing its said [63A] claim against the defendants herein.

III.

That the claim of the plaintiff herein against the defendants upon the bond sued upon in this action is invalid and unenforceable, and said bond is without valid consideration.

IV.

That no valid attachment of the property described in the complaint and referred to in said bond was ever made on behalf of the plaintiff, and the bond executed for the supposed release of the same from attachment was without consideration and is null and void.

V.

That defendants are entitled to judgment in their favor, and that plaintiff take nothing by this action.

Dated at Fairbanks, Alaska, this 8th day of May, 1920.

By the Court.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 15, page 42.

[Endorsed]: Lodged April 22, 1920. Filed in the District Court, Territory of Alaska, 4th Div. May 8, 1920. H. Claude Kelly, Clerk. [64]

(Title of Court and Cause.)

Exceptions to Findings of Fact and Conclusions of Law.

The plaintiff excepts to the findings of fact and conclusions of law made by the Court and filed herein on May 8, 1920, as follows:

I.

Plaintiff excepts to the first finding of fact for the reason that the same is not within the issues and evidence in the case, and is in itself incomplete and inconsequential.

II.

The plaintiff excepts to the second finding of fact for the reason that it covers only part of the facts as shown by the evidence in reference to the chattel mortgage mentioned therein, and omits important phases of the evidence bearing on the validity of said mortgage.

III.

The plaintiff excepts to the 3d finding of fact be-

cause the same is not supported by the evidence and is contrary thereto.

IV.

The plaintiff excepts to the 4th finding of fact because the same is not within the issues made by the pleadings.

V.

The plaintiff excepts to the first conclusions of law because the same is in part a finding of fact, and in that respect omits important parts of the evidence.

VI.

The plaintiff excepts of the 2d conclusion of law for the reason that the same is wholly unsupported by the pleadings, evidence [65] and findings of fact.

VII.

The plaintiff excepts to the 3d conclusion of law because there is no finding of fact upon which the same could be or is based and the same is contrary to all the testimony.

VIII.

The plaintiff excepts to the 4th conclusion of law because the same is not supported by any sufficient finding of fact, and is in contradiction to all the evidence herein.

IX.

The plaintiff excepts to the 5th conclusion of law for the reason that the same is not warranted by the findings of fact and the evidence produced at the trial.

X.

The plaintiff excepts to the action of the Court in

denying and overruling its "Objections to the Findings of Fact proposed by Defendants (adopted and signed by the Judge) and Requests for Eliminations, Substitutions, Corrections and Additions," as such objections, etc., appear in the files in this case, set out in full in its formal objections to such findings and requests in connection therewith.

LOUIS K. PRATT,
Attorney for Plaintiff.

Due service of the foregoing exceptions to findings of fact and conclusions of law, by receipt of copy thereof, acknowledged this 11th day of May, 1920.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [66]

[Title of Court and Cause.]

Judgment.

Be it remembered that this action came on regularly for trial at the General March, 1919, Term of above-named court, by the court without a Jury, both plaintiff and defendants by their attorneys having in open court waived jury trial, which waiver was duly entered in the journal of said court; then appeared the plaintiff by its attorney, L. K. Pratt, and the defendants by their attorney, A. R. Heilig. Whereupon, on May 1, 2, 6, and 7, 1919, the parties above-named submitted their evidence and said at-

torneys argued said cause and the Court took the same under advisement; that thereafter the Court rendered and filed an opinion in said cause in favor of defendants, and on May 8, 1920, made, gave and filed with the clerk of said court its decision in writing, stating the facts found and the conclusions of law separately, which decision has been entered in the journal of said court; that thereupon plaintiff filed a motion for a new trial, and the same having been duly considered by the court, is now overruled, and upon consideration of the premises it is now

ORDERED, ADJUDGED, AND DECREED that the plaintiff take nothing by its action, and that the defendants recover from plaintiff their costs and disbursements herein.

Dated May 11, 1920.

By the Court.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 15, page 54.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [67]

[Title of Court and Cause.]

Motion for New Trial.

The plaintiff moves the Court for an order setting aside its decision and verdict as contained in the findings of fact and conclusions of law filed herein May 8th, 1920, and granting it a new trial, on the following grounds:

I.

Because the Court erred in its findings of fact Nos. 1, 2, 3, and 4, in that finding No. 1 is not within the issues, as made by the pleadings and evidence, finding No. 2 only partially covers the testimony on the subject therein referred to, finding No. 3 is contrary to all the testimony, and finding No. 4 is outside the issues and inconsequential.

II.

Because the Court erred in its conclusions of law Nos. 1, 2, 3, 4, and 5, in the particulars that:

Conclusion No. 1 is a combination of finding of fact and conclusion of law; conclusion No. 2 is unsupported by the pleadings, evidence and findings of fact; the 3d conclusion of law has no finding of fact as a basis and is contrary to the evidence; the 4th conclusion is not supported by a sufficient finding of fact and is in contradiction to all the evidence introduced at the trial, and the 5th conclusion is wholly unwarranted by the issues, evidence, and findings.

III.

Because the Court erred in overruling plaintiff's "Objections [68] to the findings of fact and conclusions of law proposed by defendants and its requests for eliminations, substitutions, corrections and additions thereto," and in signing and filing findings of fact and conclusions of law as proposed and tendered by defendants, the said "objections, etc.," being on file herein, to which reference is made.

IV.

Because said findings of fact, conclusions of law

and verdict are contrary to law are not supported by sufficient evidence and are contrary thereto.

The record and files in the case will be used by plaintiff at the hearing of this motion.

LOUIS K. PRATT,
Attorney for Plaintiff.

Due service of the foregoing motion for new trial by receipt of copy thereof, acknowledged this 11th day of May, 1920.

A. R. HEILIG,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. May 11, 1920. H. Claude Kelly, Clerk. [69]

[Title of Court and Cause.]

General March, 1920, Term—Fifty-fourth Court Day.

Tuesday, May 11, 1920.

Order Denying Motion for New Trial.

And now appeared in court A. R. Heilig, Esq., counsel for the defendants herein, and stated to the Court that he had prepared a notice of hearing on motion for new trial filed by plaintiff herein, and attempted to serve the same on Louis K. Pratt, Esq., attorney for plaintiff, and being unable to do so, the same was served upon the said Louis K. Pratt, Esq., by L. R. Gillette, at the residence of the said Louis

K. Pratt, Esq., as more fully appears by the affidavit of said L. R. Gillette; whereupon the Court, upon an examination of the said motion for new trial, and consideration of the same, and being of the opinion that the same should be denied, denied the same and entered judgment for defendants.

CHARLES E. BUNNELL,
District Judge. [70]

[Title of Court and Cause.]

Assignments of Errors.

The plaintiff below and plaintiff in error in the United States Circuit Court of Appeals for the Ninth Circuit will rely for a reversal by said Circuit Court of Appeals of the judgment against it in the lower court on the following errors appearing in the record of the case, to wit:

1st. The Court erred in overruling plaintiff and plaintiff in error's motion to strike out a part of the 1st paragraph of its amended complaint and parts of the answer.

2d. The Court erred in overruling the motion to strike out portions of the amended answer presented by plaintiff and plaintiff in error.

3d. The Court erred in overruling the demurrer of plaintiff and plaintiff in error to certain of the supposed affirmative defenses appearing in the amended answer.

4th. The trial Court erred in making and signing the 1st, 2d, 3d, and 4th findings of fact and in

its conclusions of law numbered from 1 to 5, inclusive, and in overruling and disregarding the exceptions thereto tendered by plaintiff and plaintiff in error.

5th. The Court erred in disregarding and in refusing to yield to the "Objections, eliminations, substitutions, corrections, and additions," as affecting the findings of fact and conclusions of law prepared by defendants' attorney and afterwards signed and filed in the case, which "Objections, eliminations, etc.," were filed at the proper time and appear as a part of the record herein. [71]

6th. The Court erred in rendering judgment in favor of the defendants and against plaintiff below.

LOUIS K. PRATT,

Attorney for Plaintiff Below and Plaintiff in Error.

Received a copy of the foregoing assignments of error this 17th day of February, 1921.

A. R. HEILIG,

Attorney for Defendants and Defendants in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. [72]

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, H. Claude Kelly, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby

certify that the foregoing, consisting of eighty-two pages, numbered from 1 to 82, inclusive, constitutes a full, true and correct transcript of the record on writ of error in cause No. 1624, The Ross-Higgins Company, a Corporation, Plaintiff and Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants and Defendants in Error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action, and made a part of this transcript, and by virtue of the citation issued in said cause and is the return thereof in accordance therewith, and I certify that the writ of error, citation on writ of error and order enlarging return day, annexed hereto, are the originals thereof.

And I do further certify that the index thereof, consisting of page i, is a correct index of said transcript; also that the cost of preparing said transcript and this certificate, amounting to Thirty-seven Dollars and 85/100 (\$37.85), has been paid to me by counsel for plaintiff in error in this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court this 18th day of March, A. D. 1921.

[Seal]

H. CLAUDE KELLY,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

Writ of Error.

THE UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to
the Honorable, the Judge of the District Court
for the Territory of Alaska, Fourth Division,
GREETING:

Because in the record and proceedings, as also in the rendition of the judgment in said District Court before you in an action at law wherein The Ross-Higgins Company, a corporation, was the plaintiff and is the plaintiff in error in the Appellate Court and L. F. Protzman and F. S. Gordon were the defendants and are the defendants in error in the Appellate Court, a manifest error hath happened to the great damage of the said plaintiff below and plaintiff in error, as by its petition for a writ of error appears:

We, being willing that error, if any hath been, should be corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, including a copy of the typewritten opinion of the trial Judge, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 19th day of March, A. D. 1921, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, the 17th day of February, 1921.

[Seal] H. CLAUDE KELLY,
Clerk of the District Court for the Territory of
Alaska, Fourth Division.

The foregoing writ is hereby allowed.

CHARLES E. BUNNELL,
District Judge.

Due service of the foregoing writ of error, by receipt of copy thereof, acknowledged at Fairbanks, Alaska, this 17th day of February, 1921.

A. R. HEILIG,
Attorney for Defendants Below and Defendants in
Error.

No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon Defendants in Error. Writ of Error. Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By ————, Deputy.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to
L. F. Protzman and F. S. Gordon, Defendants
Below and Defendants in Error, and to A. R.
Heilig, Their attorney:

YOU ARE HEREBY CITED AND ADMON-
ISHED to be and appear at the United States Cir-
cuit Court of Appeals for the Ninth Circuit, to be
holden at the city of San Francisco, in the State of
California, within thirty days from the date of this
writ, pursuant to a writ of error filed in the clerk's
office of the District Court for the Territory of
Alaska, Fourth Division, wherein The Ross-Higgins
Company, a corporation, plaintiff in the court be-
low, is plaintiff in error, and L. F. Protzman and
F. S. Gordon, defendants in the court below, are
defendants in error, to show cause, if any there be,
why the judgment and order in the said writ of error
mentioned should not be corrected, set aside and
reversed, and speedy justice should not be done to
the plaintiff in error in that behalf.

WITNESS the Honorable EDWARD DOUG-
LAS WHITE, Chief Justice of the Supreme Court
of the United States of America, this 17th day of
February, 1921, and of the Independence of the
United States the one hundred and forty-sixth.

CHARLES E. BUNNELL,
Judge of the District Court for the Territory of
Alaska, Fourth Judicial Division.

[Seal]

Attest: H. CLAUDE KELLY,

Clerk.

Due service of the foregoing citation on writ of error by receipt of copy thereof acknowledged at Fairbanks, Alaska, this 17th day of February, 1921.

A. R. HEILIG,

Attorney for Defendants Below and Defendants in Error.

No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants in Error. Citation on Writ of Error. Filed in the District Court, Territory of Alaska, 4th Division. Feb. 17, 1921. H. Claude Kelly, Clerk. By———, Deputy.

[Title of Court and Cause.]

Order Enlarging Return Day of Writ of Error.

On application of the said plaintiff in error, by reason of the great distance from Fairbanks, Alaska, to San Francisco, California, and the delays and uncertainties in the transmission of mail matter between the said points,—

IT IS ORDERED that the return day of the writ
of error allowed in this cause on the ¹⁷~~19th~~ C. B.
February,
day of ~~March~~ 1921, be enlarged to the 10th
day of May, 1921.

Dated at Fairbanks, Alaska, this 17th day of February, 1921.

CHARLES E. BUNNELL,

District Judge.

Entered in Court Journal No. 15, page 83.

Service of the foregoing order enlarging the return day of the writ of error herein acknowledged by a receipt of copy this 17th day of February, 1921.

A. R. HEILIG,

Attorney for Defendants Below and Defendants in Error.

Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk.
By —————, Deputy.

[Endorsed]: No. 3676. United States Circuit Court of Appeals for the Ninth Circuit. The Ross-Higgins Company, a Corporation, Plaintiff in Error, vs. L. F. Protzman and F. S. Gordon, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed April 20, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

At a stated term, to wit, the October Term, A. D. 1920, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixth day of June, in the year of our Lord one thousand nine hundred and twenty-one. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3676.

THE ROSS-HIGGINS COMPANY,

Plaintiff in Error,

vs.

L. F. PROTZMAN et al.,

Defendants in Error.

Motion for Leave to File Amended Assignments of Error.

ORDERED motion of plaintiff in error filed May 18, 1921, for leave to file amended assignment of errors granted.

In the District Court, Fourth Judicial Division,
Territory of Alaska.

No. 1624.

THE ROSS-HIGGINS COMPANY, a Corpora-
tion,

Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,

Defendants.

Amended Assignment of Errors.

The plaintiff below and plaintiff in error in the United States Circuit Court of Appeals for the 9th Circuit (leave of Court first having been obtained in that behalf), will rely for a reversal of the judgment against it in the lower court on the following errors appearing in the record of the case, to wit:

1st. The Court erred in overruling plaintiffs and plaintiffs in errors motion to strike out a part of the 1st paragraph of its amended complaint and the 1st and 2d affirmative defense in the answer, the grounds of the motion being that the matter objected to and asked to be stricken out was sham, frivolous and immaterial, and further, that as to the supposed defenses the defendants were estopped and barred from interposing the same, and that the 2d supposed defense was also contradictory to the allegations of the 3d or last affirmative defense.

2d. The Court erred in overruling the plaintiff and plaintiff's in error's motion for "orders affect-

ing the amended answer," which motion pointed out that the first affirmative defense therein attempted to raise an immaterial issue; that the 2d was indefinite in not giving the name of the third person who was said to own the attached property at the date of levy and the 3d was the same matter previously stricken by the trial Court from the original answer as sham, frivolous and immaterial, that it was subject to the same criticism in the amended answer, and that defendants were estopped in the admissions contained in the amended answer from raising the questions sought to be brought forward by said 3d supposed defense.

3d. The Court erred in overruling plaintiff and plaintiff's in error's demurrer to the 1st, 2d and 3d affirmative defenses in the amended answer on the ground that the allegations of fact in each were insufficient in law to constitute a defense to the cause of action set up in the amended complaint.

4th. The trial Court erred in making and signing the said 1st and 4th findings of fact and the corresponding conclusions of law numbered 2 and 3, on the subject of the duty of foreign corporations to file certified copies of articles of incorporation, financial statements, etc., with the Secretary of the Territory and District Clerk of the Division where the business was carried on, the same in view of the admissions contained in the pleadings and the findings of fact as filed and in the court's "decision" not being any part of the issues to be tried, the said admissions and findings showing that plaintiff had quit doing business in Alaska long before the forth-

coming bond, the basis of plaintiff's action, had been taken; the 3d finding of fact and the 4th and 5th conclusions of law are erroneous because contrary to the admissions contained in the pleadings and the findings of fact signed and filed and in the court's "decision," such admissions and findings showing conclusively that the attachment proceedings in connection with which the foregoing bond sued out was executed were regular and valid and that defendants were estopped to raise the question of their invalidity; there was also error in disallowing plaintiff's exceptions to the findings and conclusions.

5th. The Court erred in disregarding and in refusing to yield to and adopt the objections, substitutions, corrections and additions as affecting the findings of fact and conclusions of law as signed and filed in the case, which "objections, eliminations, etc.," were filed at the proper time and appear as a part of the record herein.

6th. The Court erred in rendering judgment in favor of the defendants and against plaintiff below.

LOUIS K. PRATT,

Attorney for Plaintiff.

Service of the foregoing proposed amended assignment of errors by receipt of copy acknowledged this 27th day of April, 1921.

A. R. HEILIG,

Attorney for Defendants.

[Endorsed]: No. 3676. District Court, Fourth Judicial Division, Territory of Alaska. The Ross-Higgins Company, a Corporation, Plaintiff, vs. L.

F. Protzman and F. S. Gordon, Defendants.
Amended Assignment of Errors. Filed May 18,
1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

THE ROSS-HIGGINS COMPANY, a Corpora-
tion,

Plaintiff,

vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants.

Stipulation Re Printing Record.

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in said court all captions may be omitted after the title of the cause has once been printed, and the words "Title of Court and Cause" and the name of the paper or document substituted therefor.

After printing the assignment of errors, writ of error and citation, other papers connected with the writ of error need not be inserted in the record. Otherwise than as above indicated, we desire that the transcript of the case be printed in its entirety.

Dated at Fairbanks, Alaska, this 17th day of Feb., 1921.

LOUIS K. PRATT,
Attorney for Plaintiff in Error.

A. R. HEILIG,
Attorney for Defendants in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Feb. 17, 1921. H. Claude Kelly, Clerk. By ———, Deputy.

No. 3676. United States Circuit Court of Appeals for the Ninth Circuit. Ross-Higgins Company vs. Protzman et al. Stipulation Re Printing of Record. Filed Apr. 19, 1921. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE ROSS-HIGGINS COMPANY,
Plaintiff in Error,

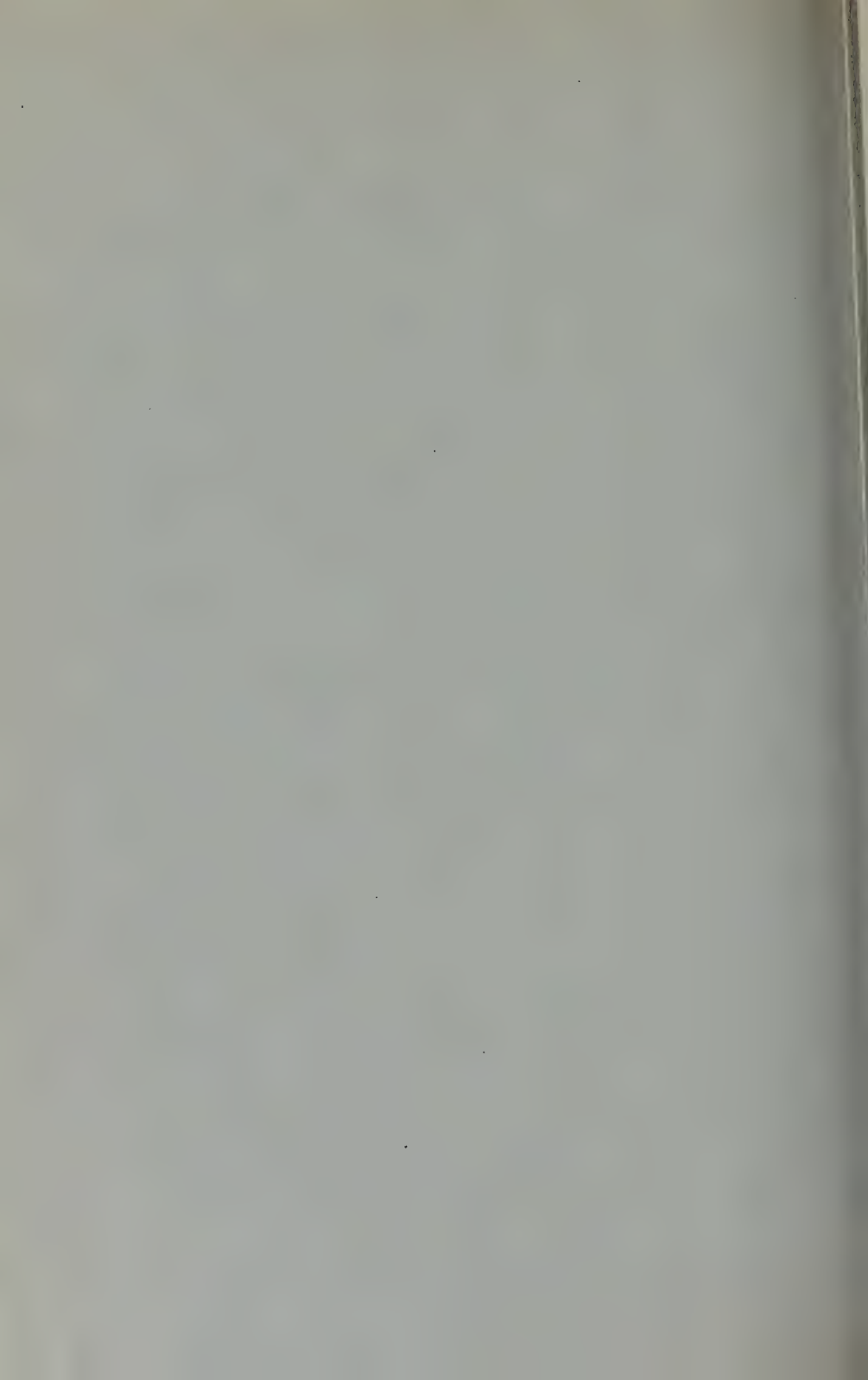
vs.

L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

REPLY BRIEF ON BEHALF OF DEFENDANTS
IN ERROR

FILED
OCT 25 1911
F. D. MONCKTON
CLERK

KERR, McCORD & IVEY,
JAMES A. KERR,
Attorneys for Defendants in Error.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

No. 3676.

THE ROSS-HIGGINS COMPANY,
Plaintiff in Error,
vs.
L. F. PROTZMAN and F. S. GORDON,
Defendants in Error.

Brief on Behalf of Defendants in Error.

STATEMENT.

This action was commenced by plaintiff in error, an Oregon corporation, in the District Court of the United States, Fourth Judicial Division of Alaska, on April 17th, 1911. The issues were framed and it was allowed to remain untried until May 1st, 1919. As shown by the transcript May 1st, 2nd, 6th and 7th were devoted to the trial. Plaintiff in error has not brought to this court the evidence upon which the cause was determined, but now seeks a reversal of the judgment upon technical grounds

and upon assumptions which are negatived by the Findings of Fact of the trial court. He seeks to inject into the case one or more questions neither within the issues nor presented to or passed on by Judge Bunnell. The whole fabric of his argument is based upon a line of cases that have no bearing whatever on the statutes of Alaska which declare the contract of a non-complying foreign corporation "void and unenforceable."

The trial court found:

1. That plaintiff was a foreign corporation; that in 1906 and 1907 it conducted a mercantile business at Fairbanks in the Fourth Judicial Division; that it sold during said period to one Ohlsen merchandise, and received payments on accounts thereof until in August, 1907, when Ohlsen owed it a balance of \$1689.72; that it did not at any time file in the office of the clerk of the District Court of said division of the territory of Alaska a duly authorized copy or any copy of its charter or articles of incorporation, nor any other statement required by law, excepting its annual report for the year 1906. (Record, pp. 70, 81, Findings of Fact 1 and 4.)

The trial court found (II Findings of Fact, p. 70, Record) that Peter Vachon prior to April 7th, 1908, was a merchant at Fairbanks and had sold merchandise to Ohlsen for which he was indebted in the sum of \$1418.92, and that on April 7th he applied to

Vachon for more goods, agreeing to execute a mortgage on his stock for the purchase price; that Vachon then sold him additional goods of the value of \$2,433.15, and received from Ohlsen and forthwith placed of record such mortgage; that Ohlsen continued to sell the goods covered by the mortgage in the usual course of his business, kept an account of sales and paid to Vachon at intervals of one or two weeks the proceeds of such sales, less small amounts kept for making change; that this continued until August 27th, 1908, at which date his indebtedness to Vachon had been reduced in the sum of \$603.92.

The court further found:

That on August 20th, 1908, plaintiff commenced an action against Ohlsen for goods sold him and in 1911 recovered a judgment for \$1404.85; that in said action plaintiff caused a writ of attachment to issue against the property of Ohlsen; that on August 27th, 1908, a deputy marshal "went with the writ to Ohlsen's place of business and made a memorandum of goods found in his store building and then left the store building and the goods therein contained and did not remove any part of said goods nor place any person in charge thereof, and did not take any of said goods into his custody"; that the value of the goods was \$1900; that thereafter Ohlsen delivered the possession of the goods to Vachon, be-

ing the goods covered by his mortgage, and Vachon sold them for the best price obtainable, which was insufficient to pay the sums due Vachon.

Ten days after the visit of the marshal to Ohlsen's place of business, defendants in error executed and delivered to the marshal a forthcoming bond (Record, p. 10), upon which this action is predicated.

The conclusions of law of the trial court, found on page 82, Record, are:

That plaintiff while carrying on business at Fairbanks failed to comply with the laws of Alaska relating to foreign corporations and that the court was prohibited from enforcing its said claim; that the bond was given without consideration, was invalid and unenforceable; that no valid attachment was made or effected.

ARGUMENT.

The first, and we think the decisive, question in this case arises upon the proper construction of Section 660, Code of Alaska, to-wit:

"If any such (foreign) corporation or company shall fail to comply with any of the provisions of this chapter, all its contracts with citizens of the district shall be *void* as to the corporation or company *and no court of the district, or of the United States, shall enforce the same in favor of the corporation or company so failing.*" (Italics ours.)

Under the language of this statute the non-com-

plying corporation cannot *begin* or *maintain* any action on any such contract. The statute itself deprives the court of jurisdiction.

“A state in which a foreign corporation—other than one engaged in interstate or foreign commerce or which is employed by the federal government—may require it to become a domestic corporation before it engages in business in the state.”

8 Fletcher Cyc. Corp., Par. 5708.

“As has been seen elsewhere, while a corporation may be authorized and permitted to exercise its powers in another state than that by which it was created, this is not a matter of absolute right, but depends upon the express or implied consent of the other state, and it is a matter of comity. It is well settled, therefore, that a state may exclude a foreign corporation altogether from doing business or acquiring property within its limits, or it may impose any conditions or restrictions which it may see fit to impose, provided it does not thereby violate any of the provisions of its own constitution or of the Constitution of the U. S.”

8 Fletcher Cyc. Corp., Par. 5894.

“Territorial legislatures, under their general legislative powers, may exclude foreign corporations from, or impose conditions upon those doing business within their territorial limits.

Empire Co. v. Tombstone Co., 100 Fed. 910.

The statutes of the several states are variant in the provisions and requirements, and as to the terms, conditions, penalties, etc., under which foreign corporations may carry on business within the state. The reasonableness of these statutory provisions is immaterial and it is the duty of the courts to enforce them.

“The power of a state to exclude foreign corporations from doing business or exercising any other powers within the state, is absolute and its motives in doing so or the means by which it does so are entirely immaterial so long as no constitutional provisions are violated.”

8 Fletcher, 5895.

Security Co. v. Prescott, 202 U. S. 246.

Doyle v. Ins. Co., 94 U. S. 535.

State v. Ins. Co., 171 S. W. 874.

In Section 5941 Fletcher classifies the statutes of the several states under ten headings. In subdivisions six and seven he groups the statutes which declare contracts made by a non-complying foreign corporation as “void,” “unenforceable,” “wholly void,” and denies to such corporations right of access to the courts.

Under other subdivisions he classifies the statutes which merely deny such corporations the right to resort to the courts. It is under this subdivision that this court will find the cases cited by counsel

for plaintiff in error. After commenting upon the variance in statutes, Fletcher says:

“Of course the question depends primarily upon the terms of the particular statute, and the intention of the legislature.”

“All contracts made within the state which constitute the doing of business within the meaning of the statute (making the contract void) *are absolutely void and no action can be maintained by the corporation thereon*” (italics ours), citing many cases.

The statute of Wisconsin provides that the contracts of a non-complying corporation “shall be “wholly void on its behalf,” etc. The provision is in almost the same language of the Alaska code. The Supreme Court of Wisconsin, in *Ashland Co. v. Detroit Salt Co.*, 114 Wis. 66, holds that “these words mean what they say and render the contract void and a nullity, and not simply void at the option of the other party to the contract.” Florida has a like statute and its court followed the same doctrine.

Bank v. Jordan, 71 Fla. 566.

In oral argument we called attention to *Bank v. Parker* (Utah), 12 A. L. R. 1373, not only holding a contract under a like statute void, but holding that a negotiable note taken by the corporation in settlement under such a contract could not be enforced by an innocent purchaser. The Utah court say: “At-

tempted judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses and no room is left for construction," citing cases.

The contract of plaintiff in error is declared by Section 660 "*void* as to the corporation and no court of the district or of the United States shall enforce the same." This court is asked to nullify this statute upon the theory that the word "*void*" as used therein is an "epithet."

In *Katz v. Herrick*, 12 Idaho 1, in construing the words of the statutes of that state, to-wit: "absolutely null and void," the court say:

"The purpose and spirit of these provisions indicate a clear intent to make such contracts unlawful. It would hardly be consonant with the duties of the courts and the office of the judicial department of the state to uphold and enforce contracts of corporations or individuals that have transacted business in the manner and under the conditions which both the framers of the constitution and the legislative department of the state have said shall be unlawful

* * * The corporations that have transacted business without observing the legal requirements are therefore left without a remedy for enforcement

of such contracts.”

Referring to subdivisions 6 and 7, Fletcher says, Par. 5995: “It is held that the prohibition in the statute against maintaining an action (*italics ours*) *implies a prohibition against beginning it, for the beginning of an action is one of the necessary steps in maintaining it*, and the word “maintain” as used in the statute is construed to be practically synonymous with “bring” or “begin.”

In the Heilman case, 88 N. W. 441, it was contended that the statute did not prohibit the commencement of the action and that an after compliance might be resorted to, but the Minnesota court said:

“We cannot accept this construction of the statute, for a prohibition against maintaining an action implies a prohibition against beginning it, for the beginning of an action is one of the necessary steps in maintaining it. More than that, the construction of the statute urged on behalf of plaintiff would invite the very evil it was intended to prevent.” Again: “The most efficient way to compel obedience to this statute is to enforce it as it reads and not to amend it by judicial construction so as to enable a foreign corporation to avoid the consequences of a non-compliance with its terms by complying after the penalties had been incurred.”

The failure of plaintiff in error to comply with

the Alaska statute is put beyond controversy by the findings of the trial court. It follows accordingly that its contract for sale of merchandise to Ohlsen was void; that it could neither "begin" nor "maintain" an action against Ohlsen and that Judge Bunnell properly concluded as matters of law: That plaintiff was prohibited by the statute from enforcing a claim for goods sold, or against defendants in error; that the attachment was wrongfully issued and void; and, that the forthcoming bond was accordingly invalid and unenforcible.

In the Brief of plaintiff in error, p. 13, it is asserted, in the absence of the evidence, that the proofs did not show that defendants in error were citizens of Alaska. We might assert with equal emphasis that the contrary was the fact and that Protzman, Gordon and Vachon (who caused the bond to be executed) were all "old-timers," residents for years and citizens residing at Fairbanks. Even if they were not citizens, that fact would not give plaintiff in error the right to wage a suit under the statute.

1st. Protzman and Gordon in qualifying on the bond September 6th, 1908, under oath stated they were "residents and property owners of the territory," etc. September 17th, 1915, Protzman verified the amended answer at Fairbanks.

2nd. Judge Bunnell was never called upon to determine the question of their citizenship. No such

issue was raised in the trial court. Plaintiff in error requested no findings of fact.

3rd. In the motion for a new trial no such question is suggested.

4th. No error is assigned on the failure of the court to find they were citizens.

5th. No exception was taken by reason thereof. It was an after-thought, pure and simple, and is not in this case.

The second question involved in this appeal arising upon the finding of the trial court (Record, p. 81) that there was no levy of the writ of attachment upon the goods of Ohlsen. The marshal "went with said writ" to "Ohlsen's place of business and made a memorandum of goods found in his store building; then left the store building and the goods therein; did not remove any part thereof nor place anyone in charge thereof, nor take them into his own custody." The marshal visited Ohlsen's store August 27th, 1908. Ohlsen delivered the goods to Vachon, who held a chattel mortgage on them. Vachon sold them for an amount less than the sum due him. In the absence of the evidence it cannot be determined when Vachon sold the goods.

On September 7th, 1908, the forthcoming bond was executed by defendants in error at Fairbanks. There is no evidence that the stock was then in Vachon's hands or that the marshal was threatening

to attempt to seize it.

The trial court not only held the attempted attachment void, but that there was no consideration for the bond.

“Goods and chattels are attached by the actual taking of them by the sheriff from the possession of the debtor and transferring them to the control of the court.”

Waples on Attachment, Par. 283.

“Since the taking is preliminary to execution, it is important that the property should be actually taken and held as if the seizure were made after judgment under a writ of execution.”

Idem. 286.

Where the attachment proceedings are void, the obligors on release bond are not precluded from attacking the attachment is well settled by cases cited, in the opinion of Judge Bunnell.

“A judgment which is not founded on an actual debt or other legal liability due or enforible at the time of its entry will not be upheld against the creditors of the judgment debtor.”

Black on Judgments, Par. 293, 295.

Palmer v. Martindale, 10 At. 802.

The trial court correctly decided both questions, although the decision of the first rendered a decision of the second unnecessary. We respectfully submit the judgment should be affirmed.

KERR, McCORD & IVEY,
JAMES A. KERR,
Attorneys for Defendants in Error.

No. 3078

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN BASICH,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

FILED
APR 23 1933
P. O. MONROVIA
CALIF.

No.

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United States
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Names and Addresses of the Attorneys of Record:

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1110 Wilcox Building, Portland, Oregon,

For the Plaintiff in Error.

LESTER W. HUMPHREYS,

United States Attorney,

AUSTIN F. FLEGEL, JR.,

Assistant United States Attorney,

Old Post Office Building,

For the Defendant in Error.

CITATION ON WRIT OF ERROR

United States of America,
District of Oregon,—ss.

To Lester W. Humphreys, United States Attorney,
and Austin F. Flegel, Jr., Asst. United States
Attorney.

Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeal for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein John Basich is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 1st day of March, in the year of our Lord, one thousand, nine hundred and twenty-one.

R. S. BEAN,
Judge.

Due proof of service of the within Citation on Writ of Error is hereby admitted this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

John Basich,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

WRIT OF ERROR

The United States of America,—ss.

The President of the United States of America.

To the Judge of the District Court of the United
States for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The United States of America, Plaintiff and Defendant in Error, and John Basich, Defendant and Plaintiff in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you

send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the HONORABLE EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States this 1st day of March, 1921.

G. H. MARSH,
Clerk of the District Court of the United States for
the District of Oregon.

(Seal of the U. S. District Court.)

Filed March 1, 1921.

G. H. Marsh, Clerk U. S. District Court.

*In the District Court of the United States for the
District of Oregon.*

July Term 1920.

BE IT REMEMBERED, That on the 12th day of October, 1920, there was duly filed in the District

Court of the United States for the District of Oregon,
an Indictment, in words and figures as follows,
to-wit:

INDICTMENT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

John Basich,

Defendant.

INDICTMENT for Violation of Sections 21 and 3,
Title II., National Prohibition Act.

United States of America,

District of Oregon,—ss.

The Grand Jurors of the United States of America, for the District of Oregon, duly impaneled, sworn and charged to inquire within and for said District, upon their oaths and affirmations, do find, charge, allege and present:

COUNT ONE: That John Basich, the defendant above named, on, to-wit: the 4th day of August, 1920, in the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court, then and there being, did then and there knowingly and unlawfully

keep and maintain a common nuisance within the intent and meaning of the National Prohibition Act, to-wit: a building, wherein intoxicating liquor, to-wit: distilled spirits, fit for beverage purposes and containing more than one-half of one per cent of alcohol by volume was then and there manufactured and kept, in violation of said National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT TWO: That John Basich, the defendant above named, on, to-wit: the 4th day of August, 1920, in the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court then and there being, did unlawfully, knowingly and wilfully manufacture a quantity of intoxicating liquor, fit for beverage purposes, to-wit: distilled spirits, said liquor containing more than one-half of one per cent of alcohol by volume; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge, allege and present:

COUNT THREE: That John Basich, the defendant above named, on, to-wit: the 1st day of August, 1920, did unlawfully, knowingly and wilfully transport a quantity of intoxicating liquor, fit for beverage purposes, to-wit: distilled spirits, said liquor containing more than one-half of one per cent of alcohol by volume, in a Republic automobile truck, a more particular description of said truck being to the Grand Jurors unknown, said liquor aforesaid being so transported as aforesaid from the vicinity of Newberg, in the County of Yamhill, in the State and District of Oregon, and within the jurisdiction of this Court, to a place or places to the Grand Jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 12th day of October, 1920.

A TRUE BILL.

B. BULLWINKER,

Foreman, United States Grand Jury.

AUSTIN F. FLEGEL, JR.

Assistant United States Attorney.

Endorsed, "A True Bill."

B. BULLWINKER,

Foreman, United States Grand Jury.

Filed, October 12, 1920.

G. H. MARSH, Clerk.

By K. F. Frazer, Deputy.

And afterwards, to-wit, on Wednesday, the 8th day of December, 1920, the same being the 31st judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and the defendant above named by Mr. B. H. Goldstein, of counsel. Whereupon for plea to the indictment herein said by his said counsel, defendant says he is not guilty. And thereupon motion of plaintiff it is ordered that this be and the same is hereby set for hearing for Thursday, January 20, 1921.

And afterwards, to-wit, on Thursday, the 20th day of January, 1921, the same being the 68th judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. Austin F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein, of counsel. Whereupon this being the day set for the trial of this cause, now come the following named jurors to try the issue joined, viz: Louis W. Scott, Charles C. DeWold, Charles M. Cook, J. E. Pelton, J. H. Allison, George M. Haines, E. F. Burlingham, R. Freytag, Salem J. Jones, A. B. Crosby, W. T. Hibbard, and William S. Foster; twelve good and lawful men of the district, who, being accepted by both parties and being duly impaneled and sworn, proceed to hear the evidence adduced. And the said jury, having heard the evidence adduced, and the hour of adjournment having arrived, the trial of this cause is continued to Monday, January 24, 1921, at 10 o'clock A. M.

And afterwards, to-wit, on Monday, the 24th day of January, 1921, the same being the 71st judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day come the plaintiff by Mr. Austin F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein of counsel. Whereupon the jury impaneled herein being present and answering to their names, the trial of this cause is resumed. And said jury having heard the evidence adduced, the arguments of counsel and the charge of the Court, retire in charge of proper sworn officers to consider of their verdict. And thereafter said plaintiff appearing by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and said defendant in his own proper person and by Mr. Barnett H. Goldstein of counsel, said jury returns to the Court the following verdict, viz:

“We, the jury duly impaneled to try the above entitled cause, do find the defendant John Basich GUILTY as charged in Count One of the indictment, GUILTY as charged in Count Two of the indictment, and NOT GUILTY as charged in Count Three of the indictment herein.

Dated at Portland, Oregon, this 24th day of January, 1921.

W. T. Hibbard, Foreman.”

Which verdict is received by the Court and ordered to be filed. Whereupon upon motion of defendant

IT IS ORDERED that the time for passing sentence upon said verdict be and the same is hereby set for tomorrow, Tuesday, January 25, 1921.

And afterwards, to-wit, on the 24th day of January, 1921, there was duly filed in said Court, the Verdict, in words and figures as follows, to-wit:

VERDICT

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

John Basich,

Defendant.

We, the jury duly impaneled to try the above entitled cause, do find the defendant JOHN BASICH

GUILTY as charged in County One of the indictment.

GUILTY as charged in Count Two of the indictment, and

NOT GUILTY as charged in Count Three of the indictment herein.

Dated at Portland, Oregon, this 24th day of January, 1921.

W. T. Hibbard, Foreman.

Filed, January 24, 1921.

G. H. Marsh, Clerk.

And afterwards, to-wit, on Wednesday, the 25th day of January, 1921, the same being the 73rd judicial day of the regular November term of said Court; present the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

The United States of America,

vs.

John Basich.

Now at this day comes the plaintiff by Mr. A. F. Flegel, Jr., Assistant United States Attorney, and the defendant above named in his own proper person and by Mr. Barnett H. Goldstein, of counsel. Whereupon this being the day set for the passing of sentence upon said defendant on the verdict heretofore returned herein

IT IS ADJUDGED that said defendant be imprisoned in the county jail of Multnomah County, Oregon, for the term of one year on the first count of the indictment herein, and that he be imprisoned in the county jail of Multnomah County, Oregon, for the term of six months on the second count of the indict-

ment herein, said term of six months to run concurrently with the term of imprisonment adjudged on the first count of the indictment, said defendant to stand committed until this sentence be performed or until he be discharged according to law.

And afterwards, to-wit, on the 18th day of April, 1921, there was duly filed in said Court, Bill of Exceptions, in words and figures as follows, to-wit:

BILL OF EXCEPTIONS.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich.

Defendant.

BE IT REMEMBERED, that the above entitled cause came on for trial in the District Court of Oregon on the 20th day of January, 1921, before the Honorable R. S. Bean, judge, and a jury duly impaneled to try the cause, the government appearing by Austin F. Flegel, Jr., and the defendant appearing in person and by Barnett H. Goldstein, his counsel.

Whereupon, the government, to substantiate the issues on its part, offered in evidence certain testimony tending to prove the commission of an offense not covered by this indictment, to which testimony an exception was taken and allowed.

To illustrate this exception, the following is taken from the transcript of the evidence:

O. A. POWELL was called as a witness on behalf of the government and, being first duly sworn, testified:

DIRECT EXAMINATION.

Q. Mr. Powell, what is your occupation, please?

A. Police officer of the city of Portland.

Q. How long have you been engaged as police officer of the city of Portland?

A. Oh, about five years and a half.

Q. Five years and a half?

A. Yes.

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June, anyway.

MR. GOLDSTEIN: Just a moment. Does counsel purpose to ask him about a certain matter that took place in June?

MR. FLEGEL: Yes, sir.

MR. GOLDSTEIN: I have a very material objection, and I feel in fairness to the defendant that the objection will take into consideration the elaboration of a certain state of facts that will be prejudicial to him except in the absence of the jury.

THE COURT: Well, I don't.

MR. GOLDSTEIN: I realize your Honor is handicapped, but I assure your Honor that this is with respect to a certain transaction that took place prior to the time of this alleged still and has no connection with the still. If there had been any evidence at all to connect this with anything else, I could possibly see there might not be the objection to the materiality.

THE COURT: I can't tell about that until I hear it.

MR. GOLDSTEIN: But it will be before the jury.

THE COURT: I can't help that. I am not going to exclude the jury every time there is an objection made to evidence. I have too much confi-

dence in the good common sense of the jury to believe they will be influenced by anything but the testimony. That has been my experience and observation.

MR. GOLDSTEIN: After objectionable evidence has been given and an objection was not made, then we realize that an objection should have been made, and I make the objection now for the purpose of the record.

THE COURT: Well, you may go ahead. That is another matter altogether.

Q. (By Mr. Flegel.) When in June did you see John Basich?

A. I saw him on the 28th of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What if any intoxicating liquor did he have at that time in his possession?

A. He had a suitcase containing twenty-four pints of moonshine at that time.

MR. GOLDSTEIN: If the Court please, I move at this time that that answer be stricken out, on the

ground it is incompetent, irrelevant and immaterial, and if anything at all proves the commission of another separate and distinct offense that is not incorporated in this indictment and has nothing to do with this indictment. I also want to call this to your Honor's attention. Intent is not an essential ingredient of these offenses. Either the defendant did or didn't commit what he is charged with having done, and there being no particular specific intent required of him under the provisions of this prohibition act, then what he did on another occasion, separate and distinct from the one he is charged with, merely causes the jurors to center their thoughts upon some other offense, and maybe, in their deliberations, they will possibly find him guilty or not guilty upon some other separate and distinct charge. Now your Honor can readily see the difficulty, the obstacle that is placed in the way of the defendant, handicapped as he is under ordinary circumstances, but here he is required to meet other issues that were not brought out by this indictment. I have got to come here now prepared to prove his guilt or innocence upon that charge; which I may further say, so long as it is before the jury I might as well have them know it right here and now—it is there—this is the subject of another indictment against this defendant, charging him with having on June 28th had in his possession twenty-four pints of moonshine whiskey, charging him with having transported it through the city

streets of Portland, twenty-four pints of moonshine whiskey, in violation of the National Prohibition Act. To that indictment the defendant claims he is not guilty, and the trial of that case is set for the day following the termination of this trial. He is prepared to meet that issue when it comes. Let him come now and prove his guilt or innocence, or let that be established here as to this specific charge. Why should he now be compelled to prove his guilt or innocence upon both charges? That is an entirely different charge. We might as well have had both cases consolidated for the purpose of trial instead of having the defendant now compelled to bear the burden of a separate charge, of which he is made the subject of a separate indictment, and for which he is required to separately plead and try; and I therefore contend that it is proving another offense. And if counsel does not intend to go ahead with it, then I contend that the bringing of such incompetent, highly prejudicial matter, is of great prejudice to the defendant.

THE COURT: What are you claiming to connect this with the defendant here?

MR. FLEGEL: I want to show in this case later on, if your Honor please, John Basich at or about the time he was arrested was taking away moonshine liquor from this particular plant which is the subject of this indictment. We will further show

that the moonshine liquor which was found in John Basich's possession on the morning of the 28th of June was in a very peculiar bottle, a bottle which is round on one side and has beveled corners; that these bottles are rarely used as containers for moonshine liquor. This is the only case, according to officers who are informed on the subject. I will further show that bottles of the same kind have been marked for identification, which were found at this particular still, and that bottles containing this moonshine in Basich's possession on June 28th were exactly similar with the bottles at the still. It is circumstantial evidence, if the Court please, but I believe clearly material.

THE COURT: Your purpose is to connect him with this particular transaction by showing that the liquor found in his possession was in containers similar to those that were found in this still?

MR. FLEGEL: Absolutely, your Honor; and that the liquor had the same taste and appearance and proof.

THE COURT: And you propose to follow that up, as I understand, with testimony showing that he took liquor from this place?

MR. FLEGEL: Absolutely, your Honor.

THE COURT: About this time?

MR. FLEGEL: Yes, your Honor.

THE COURT: I think it is competent then under that theory.

MR. GOLDSTEIN: Exception.

THE COURT: Unless you can connect it up with this transaction it will be taken from the jury, because they can't convict him in this case for any other offense except that with which he is charged in the indictment.

MR. FLEGEL: I appreciate that, but I will connect it in the way I have stated.

THE COURT: Yes.

Q. (By Mr. Flegel.) What if any intoxicating liquor did he have in his possession on that particular occasion?

A. He had twenty-four pints of moonshine.

MR. GOLDSTEIN: This of course, your Honor, goes in subject to our objection and exception.

THE COURT: Yes, certainly.

Q. (By Mr. Flegel.) And what kind of containers was this particular moonshine in?

A. Containers like those on the table.

Q. What did you do with the moonshine liquor which you seized from John Basich?

A. Turned it over to the property clerk at the police headquarters.

Q. And what property clerk did you turn it over to?

A. Mr. Cason.

Q. When did you turn it over to him?

A. Right away that same morning.

Q. That same morning, June 28th?

A. Yes.

Q. What kind of automobile was John Basich driving that morning?

A. Driving a Buick.

Q. What license number if any did it bear?

A. Oregon state license number 28843.

Q. What hour in the morning?

A. About seven o'clock.

THE COURT: What date was that, officer?

A. June 28th, 1920.

THE COURT: About seven o'clock in the morning, you say?

A. Yes, sir.

Q. And you turned this liquor over to the property clerk, Mr. Cason?

A. Yes, sir.

Q. Who was with you at the time?

A. What time do you mean?

Q. The time you found this liquor.

A. Officers Willard, Fair and Smith.

CROSS EXAMINATION by Mr. Goldstein.

Q. You were hiding upstairs in the Oak Hotel?

A. I was in a room in the Oak Hotel.

Q. In a room secreting yourself?

A. Yes, sir:

Q. Expecting to get somebody?

A. Yes, sir.

Q. Whom did you expect to get?

A. Whoever brought the liquor that morning, if anybody.

Q. In other words, report had come to you that somebody was going to bring some booze to the Oak Hotel?

A. Yes, sir.

Q. And there were four of you who were in hiding, eh?

A. Yes.

Q. And about seven o'clock in the morning you saw the defendant, Basich, come with an automobile?

A. Yes, sir.

Q. And he had one suitcase?

A. Yes, sir.

Q. And in the suitcase there were twenty-four pints, weren't there?

A. Yes, sir.

Q. In what containers?

A. Like those there.

Q. Where are those containers? Are they here?

A. Well, I haven't had charge of them since that date. I could not tell you.

MR. GOLDSTEIN: Do you expect to present them?

MR. FLEGEL: Yes.

Q. And what does it contain, do you know?

A. Moonshine whiskey.

Q. Well, what nature? Was it made of raisins, corn, or what?

A. I would not attempt to tell you.

Q. You remember you testified, didn't you, once that it was raisin?

A. No; I don't think I ever testified to that.

Q. You heard Inspector Beeman testify that it was raisin moonshine, didn't you?

A. Well, I don't recollect if he did.

Q. Then, they came and seized the automobile?

A. Yes, sir.

Q. And put John in jail?

A. Yes, sir.

Q. And took the twenty-four pints of moonshine away?

A. Yes, sir.

Q. You don't know where he got it?

A. No, I could not say where he got it.

Q. You don't know whether it belonged to him or how it got in the car, do you?

A. Only what he said, told me at the time.

Q. And he told you a friend of his gave it to him at Gresham?

A. Yes.

Q. And asked him to bring it in for him to town?

A. He said some one hired him to bring it in, paid him twenty-eight dollars for bringing it in.

Q. Now he speaks English with a little difficulty, doesn't he?

A. Oh, I think John speaks very fluently.

Q. You put expression to what you want to believe, don't you?

A. Oh, I don't see that it makes any difference.

Q. For instance, if he wants to tell you that the party who gave him this had paid twenty-eight dollars for it, it would not be very difficult for you to think, probably honestly, that he said he paid twenty-eight dollars for it?

A. No, no, no. He said he was hauling it for somebody from Gresham. I asked him how much he was to get for hauling it in. He says twenty-eight dollars.

Q. Are you sure you didn't ask him how much this man paid for it?

A. No; no; that wasn't it.

Q. You are sure that is not what he thought?

A. That wasn't the idea, wasn't the thought at that time, or the purpose.

Q. His English is as good as yours, is it?

A. Well now, I could not say. Probably he is of foreign birth; I believe I am of American birth. It might not be as good English, it might be better.

Q. Well, would you say that his English is better than yours?

A. No, I would not say that he speaks as fluently as I do. He speaks very fluently for a man of foreign birth, I would say.

Q. But of course for an American person he speaks very indistinctly?

A. No; no; he speaks distinctly. Of course you can tell the difference. I don't mean to say you can't.

Q. You were anxious to get him, weren't you?

A. That is what I was there that night for; sure.

Q. And you got him?

A. Yes.

CHARLES CASON was thereupon called as a witness by the government and testified as follows:

That he was property clerk at the police station in the City of Portland and took charge of all property held as evidence by the police department of the City of Portland, and that he received from Police Officers Willard and O. A. Powell a suitcase containing twenty-four pints of moonshine whiskey, taken by said officers from John Basich on the 28th day of June, and that he had delivered said suitcase and liquor so received by him from said officers to the federal prohibition agent, J. H. Beeman; that said liquor, when delivered to said Beeman, was in the same condition as it was when received by said witness.

JOSEPH BEEMAN was thereupon called as a witness by the government and, upon direct examination, testified as follows:

That he was a federal prohibition agent and had been employed as such since the enactment of the National Prohibition Act; prior to that time he was in the revenue service; that he knows John Basich, the defendant; that the two bottles handed him contained samples of liquor found in a suitcase taken from defendant on June 28, 1920; that he received these bottles from the property clerk at the city jail; that they were in a suitcase containing the twenty-four pints; that he examined the liquor and found it to be corn whiskey with some hops used in it; that on the morning of June 28th the defendant told him

he lived at 728 Wilson Street, but that he learned he had not lived there for two years, and that at the time of his arrest he was living at Union Avenue and Mason Street; that he tested the contents of these bottles and found that they actually contained corn moonshine liquor, the proof of which was marked on the bottles; that he took charge of the automobile which was seized from John Basich on that occasion; that it was a Buick automobile; that two of said bottles of liquor taken from said defendant at the time of his arrest on June 28, 1920, were admitted in evidence and marked Government's Exhibits "E" and "F."

Upon cross-examination he testified that he tested the contents of these bottles about the first of July, and that the test was made before the commissioners' hearing, at which he testified as a witness; that at the hearing he did not think he testified that it was raisin moonshine; that it was possible that he might have testified that it was raisin moonshine, but he was not sure whether he did or did not; that there was some other liquor, and there may have been some of that raisin whiskey; that there were six suitcases in the case, but that but one suitcase, containing twenty-four pints, was taken out of the car in the possession of the defendant; that so far as the other suitcases were concerned, they were taken out of a room and delivered to him; that he

was not in the room; that these two bottles, however, contained corn whiskey; that he made another test about a week ago and compared it with some other liquor; that he tested it by putting it to his mouth and rinsing his mouth out to taste it; that the test was made by smelling and tasting; that he is not particularly actuated by any bad feeling against Basich; that prior to becoming a revenue inspector he was in the saloon business; that he owned the property in a saloon and a man rented the place, and when he left the property in his hands he took it over until he could dispose of it; that he ran the saloon, which was in Southern Oregon, about eighteen months; that he is enforcing prohibition now.

Upon redirect examination, the witness testified that he compared the liquor which was found in the possession of the defendant on June 28, 1920, with the liquor taken from the still at Newberg, and that he is of the opinion that the liquor is made by the same process, of the same ingredients, and that the flasks are the same.

Upon recross-examination, he testified that he compared them about a week ago; that he originally made the test of the twenty-four pints, found in the possession of the defendant on June 28, 1920, in the early part of July, 1920; that he does not know whether the liquor which was found in the defendant's possession was in fact found in his possession

except that somebody told him; that he did not take it from his possession; that he testified at the commissioners' hearing at that time, but he did not recall whether he testified that it was raisin whiskey or not; that the reason for his making another test a week ago was because he was asked to by the District Attorney's office. He then testified he did not know whether he was asked or not, but that he reported to Mr. Flegel, the Assistant United States District Attorney, that he made a test; that he did not think anyone asked him, but that he made the test of his own volition because he had a suspicion that it was the same liquor; that the only interest he had in the case was to make a successful prosecution of a violator of the law; that he was not particularly anxious to get him, but he knew that he was a violator; that he had never personally seen him violate the law, but had reports on him; that the defendant had not been convicted yet; that he tested two bottles of the twenty-four pints that were found in the defendant's possession June 28, 1920, and that they were in a vault at the custom house until about two weeks ago, then he made a second test of this liquor with the liquor that was alleged to have been brought in from the still at Newberg; that this liquor was handed to him by Mr. Stipes, who was not present at the time he made the test; that until he made the test he did not know or have any reason for believing that the prosecuting at-

torney had any knowledge that the liquor which was found in the defendant's possession in June compared with the liquor which was taken at Newberg; that at that time he was probably notified by Mr. Flegel of the date of the trial of the violation of June 28th, at which time Mr. Flegel told him he wanted him as a witness to testify as to the kind of whiskey that was seized on June 28th. This was before he made the test, which he did without being required. He then testified that Mr. Flegel did suggest to him making a test to find out how the liquor compared.

C. R. STIPE and JOHNSON SMITH, were thereupon called as witnesses by the government and testified as follows:

That on the fourth day of August, 1920, on the W. L. Hall ranch in the vicinity of Newberg, Yamhill County, Oregon, pursuant to a government search warrant, a distilling apparatus was discovered in a cabin on said ranch; that said distilling apparatus was in operation at the time it was found by the officers; that in said cabin was also found about 800 gallons of mash in a state of fermentation, fit for distilling into spirits, said mash being prepared principally from cracked corn; that said witnesses also found in said cabin about 150 gallons of corn moonshine whiskey and about 1000 pint bottles of uniform size and shape, and that three of said

bottles, filled with samples of said corn moonshine whiskey, were offered and admitted in evidence and marked Government's Exhibits "A," "B" and "C."

DELMAR HALL, DORIS MILLER, LAWRENCE HALL and JOHN HESS were thereupon called as witnesses by the government and testified as follows:

That they had seen the defendant, John Basich, come to the Hall ranch on numerous occasions during the Spring and Summer of 1920 and go to the cabin in which said distilling apparatus was found.

DELMAR HALL further testified that he had seen the defendant bring to the Hall ranch building material from which said cabin was constructed, and also saw him bring to said cabin grain sacks which appeared to be filled.

BOB UGAN was thereupon called as a witness by the government and testified as follows:

That he was employed by the defendant on the 27th day of March, 1920, to build the cabin in which said distilling apparatus was found on the Hall ranch, and commenced the erection thereof about the first day of May, 1920, completing the same about ten or fifteen days later; that he was employed to operate said distilling apparatus for the purpose of manufacturing corn moonshine whiskey; that

said defendant agreed to pay said witness the sum of \$300.00 a month and expenses, and further promised, in the event that said witness was arrested, to pay any fine or other expense incurred by said witness; that said witness had previously been employed by defendant to operate a still in the vicinity of Boring, Oregon, on which occasion witness had been arrested and fined, and that defendant had paid his fine on said occasion; that defendant had brought to said cabin on the Hall ranch the distilling apparatus found there by the officers and had likewise brought to the cabin all supplies and materials used by witness in manufacturing said intoxicating liquor; that some 400 or 500 gallons of liquor had been manufactured by witness for defendant in said cabin at said Hall ranch prior to the time of its discovery by the officers; that the defendant, John Basich, had assisted witness in manufacturing said intoxicating liquor and had removed from said cabin all liquor so manufactured; that the mash used in the manufacture of said liquor was made from corn, sugar and hops; that it was made under defendant's direction and at his instance and request; that said liquor was bottled in bottles similar to those introduced in evidence and marked Government's Exhibits "A," "B," "C," "E" and "F;" that said intoxicating liquor was taken away from said cabin by defendant once or twice a week sometimes in lots of five or ten gallons at a time.

That after the close of the evidence and the argument of counsel, the Court charged the jury in part as follows:

“Now, there was testimony introduced in this case that in June of 1920 the defendant was apprehended with a suitcase containing liquor. He is not on trial for that offense. That evidence is to be considered by you only as bearing upon the issues tendered by the indictment in this case. It was admitted for no other purpose and is not to be considered by the jury for any other purpose. That is, unless you believe, beyond a reasonable doubt, that the defendant kept and maintained a nuisance, as I have defined that term to you, or that he manufactured intoxicating liquor, or that he transported intoxicating liquor, as stated in the indictment, you would not be justified in finding him guilty simply because you believed that he was in possession of intoxicating liquors at the time of his apprehension.”

AND, NOW, because all the foregoing matters and things are not of record in this case, I, R. S. Bean, the judge who tried the above entitled cause in the above entitled court, do hereby certify that the foregoing bill of exceptions correctly states all the proceedings had before me on the trial of said cause so far as they pertain to this particular exception,

and truly states all the rulings of the Court upon the questions of law presented; and that the exceptions taken by defendant's attorney were duly taken and allowed; that said bill of exceptions was prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in said cause, and the same is hereby ordered to be made a part of the record in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of April, 1921.

R. S. BEAN,
United States District Judge.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of April, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed April 18, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, a Petition for Writ of Error in words and figures as follows, to-wit:

PETITION FOR WRIT OF ERROR.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant,

Your petitioner, John Basich, defendant in the above entitled cause now comes and brings this, his petition as plaintiff in error, for a writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioner shows:

That on the 25th day of January, 1921, there was rendered and entered in the above entitled cause a judgment in and by said District Court of the United States for the District of Oregon, wherein and whereby your petitioner was sentenced and adjudged to be imprisoned in the county jail of Multnomah County, Oregon, for the term of one year on the first count of the indictment herein, and that he be imprisoned in the county jail of Multnomah County, Oregon, for the term of six months on the second count of the indictment herein; said term of six months to run concurrently with the term of im-

prisonment adjudged on the first count of the indictment.

And your petitioner further shows that he is advised by counsel that there are manifest errors in the records and proceedings at and in said cause in the rendition of said judgment and sentence, to the great damage of your petitioner, all of which errors will be made to appear by examination of the said record and more particularly by an examination of the bill of exceptions by your petitioner tendered and filed herein and in the assignments of error filed and tendered herewith.

To the end, therefore, that the said judgment, sentence and proceedings may be reversed by the United States Circuit Court of Appeals of the Ninth Circuit, your petitioner prays that a writ of error may be issued, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law, and the practice of this Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignments of error and all proceedings had in said cause; that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit to the end that the errors, if any have happened, may be fully corrected, and full and speedy justice done your petitioner.

And your petitioner now makes his assignments of error filed herewith upon which he will rely, and which will be made to appear by the return of said record in obedience to said writ.

WHEREFORE, your petitioner prays the issuance of a writ as hereinbefore prayed for, and prays that his assignments of error filed herewith may be considered as his assignments of error upon the writ, and that the judgment rendered in this cause may be reversed and held for naught and said cause remanded for further proceedings, and also that an order be made fixing the amount of security which the said petitioner shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court against the said petitioner be suspended and stayed until the determination of the said writ of error in the said Circuit Court of Appeals.

BARNETT H. GOLDSTEIN,
Attorney for Petitioner.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy, admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, Assignment of Errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

No. C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

Now comes the plaintiff in error, the defendant above named, by his counsel, and presents this assignment of errors containing the assignment of errors upon which he will rely in the United States Circuit Court of Appeals for the Ninth Circuit, and specifies the following particulars wherein it is claimed that the District Court erred in the course of the trial of said cause:

I.

That the court erred in overruling the objection of counsel for the defendant to the following testimony given by O. A. Powell, a witness on behalf of the government:

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June anyway.

* * * * *

Q. When in June did you see John Basich?

A. I saw him on the 28th of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What, if any, intoxicating liquor did he have in his possession at that time?

A. He had a suitcase containing twenty-four pints of moonshine at that time.

* * * * *

Q. What kind of automobile was John Basich driving that morning?

A. Driving a Buick.

Q. What license number, if any, did it bear?

A. Oregon state license number 28843.

II.

That the court erred in overruling the motion of counsel for the defendant to take from the jury and to strike out the testimony of O. A. Powell tending to show the commission of an offense by the defendant not covered by the indictment herein, that is to say, testimony relating to the possession and transportation of liquor by the defendant in the City of Portland on June 28, 1920, for which offense a separate indictment was then and there pending against said defendant and for which he was not then on trial.

III.

That count I of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

IV.

That count II of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

V.

That the court erred in entering an order committing the defendant to twelve months in the

county jail on count I of the indictment, and to six months in the county jail on count II of the indictment.

VI.

That the judgment and sentence of the court is contrary to law.

WHEREFORE, the defendant, the plaintiff in error, prays that the above and foregoing assignment of errors be considered as his assignment of errors upon the writ of error; and further prays that the judgment heretofore rendered in this case may be reversed and held for naught, and that plaintiff in error, defendant above named, have such other and further relief as may be in conformity to law and the practice of the court.

BARNETT H. GOLDSTEIN,
Attorney for Defendant and Plaintiff in Error.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Tuesday, the 1st day of March, 1921, the same being the 102nd judicial day of the regular November term of said Court; present the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OR ERROR.

C-9052.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

Plaintiff,

vs.

John Basich,

Defendant.

Upon reading and filing the petition of the said defendant, John Basich, for an order allowing him to prosecute a writ of error from the United States Circuit Court of Appeals of the Ninth Circuit to the District Court of the United States for the District of Oregon, and

It appearing that said defendant has filed herein the assignment of errors relied upon, it is now therefore hereby ordered that said petition hereinbefore referred to be, and the same is, hereby allowed, and that a writ of error issue as in said petition prayed

for, and that a citation be issued and served herein, and it is further ordered that said writ of error so allowed operate as a supersedeas, and the defendant be admitted to bail upon furnishing a bond in the penal sum of Four Thousand Dollars (\$4000.00), conditioned according to law to be approved by me.

Dated March 1, 1921.

R. S. BEAN,
Judge.

State of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant U. S. Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 1st day of March, 1921, there was duly filed in said Court, Bail Bond on Writ of Error in words and figures as follows, to-wit:

BAIL BOND ON WRIT OF ERROR.

C-9052

*In the District Court of the United States for the
District of Oregon*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

KNOW ALL MEN BY THESE PRESENTS,
That I, John Basich, of the County of Multnomah,
State of Oregon, as principal, and A. Sorich, of the
County of Multnomah, State of Oregon, and W.
Pavlich and John Kralovich, of the County of Mult-
nomah, State of Oregon, as sureties, are held and
firmly bound unto the United States of America in
the full and just sum of Four Thousand Dollars, to
be paid to the United States of America, to which
payment well and truly made we bind ourselves, our
heirs, executors and administrators, jointly and
severally by these presents.

Sealed with our seals and dated this 1st day of
March, in the year of our Lord, One Thousand Nine
Hundred and Twenty-one.

Whereas, lately on the 25th day of January,
1921, at Portland, Oregon, in the District Court of
the United States for the District of Oregon, in a
cause pending in said Court between the United
States of America, plaintiff, and John Basich, de-
fendant, a judgment and sentence was rendered
against said John Basich, and said John Basich ob-
tained a writ of error from the United States Circuit

Court of Appeals for the Ninth Circuit to the United States District Court to reverse the judgment and sentence in the aforesaid cause, and a citation directed to said United States of America, citing and admonishing the United States of America to be and appear in the said Court thirty days from and after the date thereof, which citation has been duly served.

Now the condition of said obligation is such, that if the said John Basich shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument or when required by law or rule of said Court, and from day to day thereafter in said Court until said cause shall be finally disposed of, and shall abide by and obey the judgment and all orders made by the said Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct, if the judgment and sentence against him shall be affirmed, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

J. BASICH, (Seal)

A. SORICH, (Seal)

W. PAVLICH, (Seal)

JOHN KRALOVICH. (Seal)

State of Oregon,
County of Multnomah,—ss.

I, A. Sorich, W. Pavlich and I, John Kralovich, whose names are subscribed as sureties to the above described bond, being severally duly sworn, each for himself says, that I am a resident and freeholder within the State of Oregon and am worth the sum of Four Thousand Dollars over and above all property exempt from execution.

A. SORICH,
W. PAVLICH,
JOHN KRALOVICH.

Subscribed and sworn to before me this 1st day of March, 1921.

G. H. MARSH,
Clerk, United States District Court
District of Oregon.

(Seal)

Approved by:
R. S. BEAN, Judge.

State of Oregon,
County of Multnomah—ss.

Due, timely and legal service by copy admitted at Portland, Oregon, this 1st day of March, 1921.

AUSTIN F. FLEGEL, JR.,
Assistant United States Attorney.

Filed March 1, 1921.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 18th day of April, 1921, there was duly filed in said Court a Stipulation in words and figures as follows, to-wit:

STIPULATION.

*In the District Court of the United States for the
District of Oregon.*

United States of America,
Plaintiff,

vs.

John Basich,
Defendant.

The attorneys for the plaintiff in error herein having prepared and compared with the original record the within printed transcript, now, therefore, it is hereby stipulated and agreed by and between the parties to the within proceedings for a writ of error, by and through their respective attorneys, that the within printed record tendered to the clerk of the United States District Court for the District of Oregon for his certificate, is a true transcript of

the record in the within cause and that the clerk of said Court shall certify the said printed transcript without comparison thereof with the original record.

BARNETT H. GOLDSTEIN,
Attorney for Plaintiff in Error.

AUSTIN F. FLEGEL, JR.,
Attorney for Defendant in Error.

Dated, April 18, 1921.

CLERK'S CERTIFICATE.

United States of America,
District of Oregon,—ss.

The attorneys for the respective parties to the within proceedings having stipulated that the within printed transcript of record, as prepared, compared and tendered to me for certification by the attorneys for the plaintiff in error, is a true transcript of the record in this cause and that I shall certify the same without comparison.

Now, therefore, in accordance with the said stipulation I, G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing transcript of record upon writ of error in the case in which John Basich is defendant and plaintiff in error, and the United States of America is plaintiff and defendant in error, is a full, true and correct tran-

script of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, the same having been compared by attorneys for plaintiff in error.

And I further certify that the fee for certifying to the within transcript, to-wit: the sum of (50 cents) has been paid by the said plaintiffs in error.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Portland, in said district, thisday of April, 1921.

.....

Clerk of the District Court of
the United States for the
District of Oregon.

No. 3678

IN THE

**United States Circuit Court
of Appeals**

For the Ninth Circuit

JOHN BASICH

Plaintiff in Error

VS.

THE UNITED STATES OF AMERICA

Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

BARNETT H. GOLDSTEIN,

Attorney for Plaintiff in Error

1110 Wilcox Building, Portland, Oregon

FILE

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F. D. MOWERY

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No. 3678

IN THE

**United States Circuit Court
of Appeals**

For the Ninth Circuit

JOHN BASICH

Plaintiff in Error

VS.

THE UNITED STATES OF AMERICA

Defendant in Error

Brief for Plaintiff in Error

Upon Writ of Error to the District Court of the
United States for the District of Oregon.

STATEMENT OF THE CASE.

The defendant (plaintiff in error here) was indicted in three counts, all involving alleged violations of the Prohibition Act of October 28, 1919, commonly known as the Volstead Act. Count I alleges that the defendant, on August 4, 1920, at Newberg, Oregon, maintained a nuisance, to-wit: a building where intoxicating liquor was being manu-

factured and kept. Count II alleges that the defendant on August 4, 1920, at Newberg, Oregon, manufactured intoxicating liquor. Count III alleges that the defendant on August 1, 1920, transported intoxicating liquors in a Republic automobile truck. The jury found him guilty on the first two counts and not guilty on the third count. The Court thereupon imposed a sentence of one year on the first count and six months on the second count of the indictment, the said terms of imprisonment being the maximum sentences allowed by law for the offenses embraced by the said counts in the indictment.

From the judgment entered thereon the defendant has prosecuted this writ, urging as the principal ground for reversal the introduction of evidence on the part of the government tending to prove the commission by the defendant of a separate and distinct offense unrelated to that for which he was on trial. It is claimed by the defendant that this evidence was clearly incompetent and was highly prejudicial, particularly in view of the fact that there was then pending against the defendant a separate indictment covering the identical offense, which was permitted to be introduced as aiding the Government's case in this trial.

According to the evidence in this case, as appears from the bill of exceptions, positive evidence was introduced through one Bob Ugan, a witness for the Government, to the effect that he had been hired by

the defendant to build a cabin on a place known as the Hall Ranch at Newberg and to manufacture intoxicating liquor therein; that the witness completed the building of said cabin about May 10th or May 15th, 1920, and that he was engaged in manufacturing intoxicating liquor thereat on August 4, 1920, at which time the arrest was made. For the purpose of corroborating the testimony of this self-confessed accomplice, other witnesses on behalf of the Government testified that the defendant had been seen to go to the Hall Ranch and to the cabin where the liquor was being manufactured.

Thereupon the Government called as a witness, one O. A. Powell, a police officer of the City of Portland, who was allowed by the Court to testify over the strenuous objection of the defendant's counsel that he had arrested the defendant on June 28, 1920, at the Oak Hotel, Portland, at which time the defendant had in his possession a suit case, containing 24 pints of moonshine liquor, which liquor was transported thereto by the defendant in a Buick automobile. It will be noted that the offense of transporting and having in his possession these 24 pints of liquor on June 28, 1920, for which the defendant was arrested at that time, was made the subject of a separate indictment against the defendant, which indictment was then and there pending and was to come on for trial immediately following the completion of the trial involving the alleged offense at Newberg. It is in permitting the

introduction in this trial of the testimony involving the alleged offense at Portland that the defendant claims the Court erred.

SPECIFICATION OF ERRORS.

I.

That the Court erred in overruling the objection of counsel for the defendant to the following testimony given by O. A. Powell, a witness on behalf of the Government:

Q. Do you know the defendant in this case, John Basich?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I have known him since the arrest; in June anyway.

* * * * *

Q. When in June did you see John Basich?

A. I saw him on the 28th day of June.

Q. Where?

A. Well, I arrested him.

Q. Where?

A. At the Oak Hotel.

Q. What city?

A. Portland.

Q. What, if any, intoxicating liquor did he have in his possession at that time?

A. He had a suit case containing twenty-four pints of moonshine at that time.

* * * * *

Q. What kind of automobile was John Basich driving that morning.

A. Driving a Buich.

Q. What license number, if any, did it bear?

A. Oregon state licnese number 28843.

II.

That the Court erred in overruling the motion of counsel for the defendant to take from the jury and to strike out the testimony of O. A. Powell tending to show the commission of an offense by the defendant not covered by the indictment herein, that is to say, testimony relating to the possession and transportation of liquor by the defendant in the City of Portland on June 28, 1920, for which offense a separate indictment was then and there pending against said defendant and for which he was not then on trial.

III.

That Count I of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

IV.

That Count II of the indictment does not state facts sufficient to constitute an offense against the laws of the United States or to apprise the defendant of the precise nature of the charge.

V.

That the Court erred in entering an order committing the defendant to twelve months in the county

jail on Count I of the indictment, and to six months in the county jail on Count II of the indictment.

VI.

That the judgment and sentence of the Court is contrary to law.

ARGUMENT.

The general rule of evidence applicable to criminal trials is, that evidence tending to show the commission by the accused of another independent crime, even of the same kind as that for which he is on trial, is inadmissible for the purpose of aiding the proof that he is guilty of the crime charged. (16 C. J. 586); (Bishop's New Crim. Proc., 2nd Ed., 961); (Zoline on Fed. Crim. Law & Proc., Vol. 1, p. 296). The law excludes this evidence upon grounds of public policy, to prevent the multiplication of issues in a case and to protect a party from the injustice of being called upon without notice to explain the acts of his life not shown to be connected with the offense with which he is charged. (16 C. J. 586.)

It is easy to see how such evidence may prejudice the jury against the defendant—may, in fact, lead to his conviction of the offense with which he stands charged, because the jury may believe that he is at least guilty of the other offense. In brief, the law does not allow one crime to be proved to

raise a probability that another has been committed. This rule, so universally established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proved guilty beyond a reasonable doubt.

“This principle has long been accepted in our law—that the doing of one act is, in itself, no evidence that the same or a like act was again done by the defendant has been so often judicially repeated that it is a commonplace.”
(Wigmore on Evidence, Sec. 192.)

In *People v. Sharp*, 107 N. Y. 427, 14 N. E. 319, it was said:

“The general rule is that when a man is put upon trial for one offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded.”

In the case of *Coleman v. People*, 55 N. Y. 81, the rule is laid down as follows:

“The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a

moral point of view such evidence may be. It would be easier to believe a person guilty of one crime if it was known that he had committed another of a similar character, or, indeed, of any character; but the injustice of such a rule in courts of justice is apparent. It would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."

In the case of *People v. Shea*, 147 N. Y. 78, 41 N. E. 505, the rule is thus stated:

"The impropriety of giving evidence showing that the accused had been guilty of other crimes, merely for the purpose of thereby inferring his guilt of the crime for which he is on trial, may be said to have been assumed and consistently maintained by the English courts ever since the common law has itself been in existence. Two antagonistic methods for the judicial investigation of crime and the conduct of criminal trials have existed for many years. One of these methods favors this kind of evidence in order that the tribunal which is engaged in the trial of the accused may have the benefit of the light to be derived from a record of his whole past life, his tendencies, his nature, his associates, his practices, and in fine all the facts which go to make up the life of a human being. This is the method which is pursued in France, and it is claimed that entire justice is more apt to be done where such a course is pursued than where it is omitted. The common law of England, however, had adopted another, and, so far as the party accused is concerned, a much more merciful, doctrine. By that law the criminal is to be presumed innocent until his guilt is made to appear beyond a reasonable

doubt to a jury of 12 men. In order to prove his guilt it is not permitted to show his former character or to prove his guilt of other crimes, merely for the purpose of raising a presumption that he who would commit them would be more apt to commit the crime in question."

In the case of *People v. Grutz*, 212 N. Y. 72, Ann. Cas. 1915D, it is stated as follows:

"It is one of the distinguishing features of our common-law system of jurisprudence that, as a general rule, a person who is on trial charged with a particular crime may not be shown to be guilty thereof by evidence showing that he has committed other crimes. The reason for this general rule has been stated by this Court in a number of decisions, but never more tersely and clearly than by Judge Peckham in *People v. Shea*, 147 N. Y. 78, 99, 41 N. E. 505 supra."

In the case of *Com. v. Jackson*, 132 Mass. 16, 44 Am. Rep. 299, it is thus stated:

"The objection to the admission of evidence as to other transactions, whether amounting to indictable crimes or not, are very apparent. Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it, and, by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him."

In the case of *Shaffner v. Com*, 72 Pac. 60, 13 Am. Rep. 649, the rule is thus stated:

"It is a general rule that a distinct crime unconnected with that laid in the indictment

cannot be given in evidence against a prisoner. It is not proper to raise a presumption of guilt on the ground that, having committed one crime, the depravity it exhibits makes it likely he would commit another. Logically, the commission of an independent offense is not proof in itself of the commission of another crime. Yet it cannot be said to be without influence on the mind, for certainly if one be shown to be guilty of another crime equally heinous, it will prompt a more ready belief that he might have committed the one with which he is charged. It therefore predisposes the mind of the juror to believe the prisoner guilty."

In the case of *State v. Alston*, 94 N. C. 930, it is stated:

"As a general rule, it is not admissible on a prosecution for one offense to prove that the defendant had before committed another offense. To this there are exceptions but the offense must be brought home to the defendant."

In the case of *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69, the Court in its opinion among other things stated, as follows:

"It is a maxim of our law, that every man is presumed to be innocent until he is proved to be guilty. It is characteristic of the humanity of all the English speaking peoples, that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the Court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite consistent with that fairness of trial to which every man is entitled, that the jury should not be prejudiced against him by any evidence

except what relates to the issue; above all should it not be permitted to blacken his character, to show that he is worthless, to lighten the sense of responsibility which rests upon the jury, by showing that he is not worthy of pains-taking and care."

* * * * *

"If it were the law, that everything which has a natural tendency to lead the mind toward a conclusion that a person charged with crime is guilty must be admitted in evidence against him on the trial of that charge, the argument for the State would doubtless be hard to answer. If I know a man has once been false, I cannot after that believe in his truth as I did before. If I know he has committed the crime of perjury once, I more readily believe he will commit the same awful crime again, and I cannot accord the same trust and confidence to his statements under oath that I otherwise should. Yet, does the law permit the credit of a witness to be impeached by showing individual acts of falsehood? We do not and we cannot believe a known liar the same as we believe a known man of truth. Why, then, ought not evidence showing that a witness has lied on any particular occasion to be received, in order that we may weigh the credit of his testimony by rules derived from human nature and experience, such as we naturally and instinctively apply in the other affairs of life?

"Suppose the general character of one charge with crime is infamous and degraded to the last degree; that his life has been nothing but a succession of crimes of the most atrocious and revolting sort; does not the knowledge of all this inevitably carry the mind in the direction of a conclusion that he has added the particular crime for which he is being tried to the list of those that have gone before? Why, then,

should not the prosecutor be permitted to show facts which tend so naturally to produce a conviction of his guilt? The answer to all these questions is plain and decisive. The law is otherwise. It is the law, that the prisoner shall be presumed innocent until his guilt is proved; it is the law, that his bad character shall not be shown by the State until he has put that matter in issue by attempting to show good character for himself; it is the law, that the credit of a witness shall not be impeached by showing specific instances of falsehood against him; and it is the law, that evidence of the commission of one crime shall not be received to show the commission of another when there is no connection between the two. Whether the law in this respect is wise or unwise, whether it accords with human reason and experience, whether it affords too great protection to the criminal or too little to the community, are not questions with which we have to do. It has been thought, that to confront a man on trial for a crime that involves no more than his liberty and property with every act of his former life, and require him to purge himself from the suspicion of guilt which may be raised by the testimony of witnesses to individual instances of alleged wrongdoing, would be not only oppressive and unfair, but arbitrary and inhuman.

The rules of the common law in reference to the detection and punishment of crime, which are the growth of ages, and embody the practical wisdom and experience of many great and learned men, carry upon every page unmistakable evidence that they were devised as well to shield the innocent as to punish the guilty. Throughout they recognize the fact that innocent men may be accused of crime. A highly wrought condition of the public mind, the popular horror and indignation that arise upon the

commission of a dreadful crime, are not favorable to the calm and dispassionate application of a just and humane law. They do not always leave the vision clear. But popular clamor, however loud, cannot be permitted to invade this place without imperiling the most sacred rights of the innocent as well as the guilty."

In the case of *People v. King*, 114 N. E. 601, 276 Ill. 138, the Court in its opinion said:

"The general rule under our system of jurisprudence is that evidence of a distinct substantive offense cannot be admitted in support of another offense. This is but the reiteration of a still more general rule, that in all cases, civil or criminal, the evidence must be confined to the point in issue. This rule excludes all evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, the reason being that such evidence tends to draw away the minds of the jurors from the point in issue and arouse their prejudice. Moreover, the adverse party would not be given notice by the charges in the indictment as to what the evidence was to be as such collateral crimes."

As stated in the case of *State v. Hyde*, 234 Mo. 200, 136 S. W. 316:

"This rule rests upon two grounds—(1) the impropriety of inferring from the commission of one crime that the defendant is guilty of another; (2) the constitutional objection to compelling a defendant to meet charges of which the indictment gives no information."

The rule is founded in reason, as stated in the case of *State v. Elder*, 36 Wash. 482, 78 Pac. 1023:

“The defendant comes to the trial prepared to meet only the crime for which he is accused and he cannot, from the nature of things, be prepared to defend against other crimes that may be charged against him. Moreover, it is not the policy of the law to convict a man of one crime by showing that he has at some time been guilty of another.”

In *State v. Saunders*, 14 Ore. 309, are to be found the following excerpts:

“It seems to me that this distinction is very properly made, conceding that an ordinary witness may be interrogated upon his cross examination as to whether he has not committed other offenses that cannot affect him beyond his credit in the particular case, unless it expose him to prosecution, and then he can claim his privilege. But as regards the party accused, such examination operates as a two-edged sword; it would not only impair his credit as a witness, but create a strong prejudice in the minds of the jury against him, and be a material aid towards convicting him. Unless, therefore, a defendant in a criminal prosecution is ‘pure as the icicle which hangs on Diana’s temple,’ he had better keep off the witness stand, if the prosecution is at liberty to ransack his past life. Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs—no matter what explanation of them he attempts to make—it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any par-

ticular experience in criminal trials knows this; knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case, if they think him a scape-grace or vagabond. That is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence, except so far as it tended to impeach the testimony of the party; but what good would that do? And it is not all improbable that he himself would imbibe some of the prejudice which proof of the character referred to is liable to engender. Such a practice would necessarily prevent the party accused from ever offering himself as a witness, which would leave the jury to conjecture and speculate why he pursued such a course; and often, very probably, they would draw an unfavorable inference from the circumstance."

* * * * *

"If he were shown to be a person who had been guilty of similar acts, whose history was marked by a career of crime, and who had been a constant violator of the law, would it not render it more probable that he was guilty in the particular case?"

In the case of *State v. Baker*, 23 Ore. 442, it is stated:

"The general rule is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment, cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation. And while, as Lord Campbell says, 'it would be evidence to prove that the prisoner is a very bad man,

and likely to commit such an offense' (*Reg. v. Oddy*, 5 Cox C. C. 210), under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer."

There are, of course, exceptions to this rule, as where the commission of one offense is a circumstance tending to show the commission of the offense for which the defendant is on trial, but then *only* when it is essential to establish a motive or intent. Certainly the exception should not be permitted to go to the extent of sanctioning the idea that the defendant's propensity to commit crime or to commit crimes of the same sort as that charged, can be put in evidence to prove him guilty of the particular offense.

"While there are several well recognized exceptions to the rule excluding evidence of other offenses, the rule should be strictly enforced and should not be departed from except under conditions which clearly justify such a departure."

16 C. J. 587.

As stated in the case of *State v. O'Donnell*, 36 Ore. 244:

"These exceptions are carefully limited and guarded by the courts and their number should not be increased."

As stated in Wharton on Criminal Procedure, page 145:

“The exceptions to the general rule are those of necessity and the introduction of evidence of other offenses should only be permitted when the exigency of the particular case demands it. In any loose relaxation of the rule, the danger to the accused is that under the exceptions evidence may be adduced of offenses that he has not yet been called upon to defend, to which, if fairly tried, he might be able to acquit himself.”

In *People v. O'Brien*, 31 Pacific 48, it is stated:

“While it is true that in certain cases, like forgery and embezzlement, it is permissible to introduce evidence concerning other acts of the same nature, for the purpose of establishing a guilty intention, no such rule applies in cases of this kind where the very ground upon which the prosecution relies for a conviction is that a performance of the acts mentioned in the statute constitutes a crime regardless of any fraudulent intention.”

In *Chipman v. People*, 52 Pac. 677, it is stated:

“True it is that, in a proper case, evidence of offenses other than the one charged and of a similar character, may be admitted as tending to throw light upon the intent with which the defendant did the act for which he is on trial, but in this case the intent is not important. The mere doing of the prohibited act constitutes the offense and the specific intention with which such act is done is immaterial. The admission of such evidence of other similar offenses, therefore, could not have been otherwise than prejudicial to the defendant, and we cannot say that

such incompetent evidence did not contribute to the verdict."

In *Walker v. State*, 72 S. W. 401, it is stated:

"Wherever facts testified in regard to the case on trial are plain and certain, extraneous matter cannot be introduced under a rule in regard to system, developing the *res gestae*, or proving intent."

As stated in the case of *Gardner v. State*, 55 Tex. Crim. 400, 117 S. W. 148:

"Where positive evidence has been introduced by the State, evidence of extraneous and contemporary crimes is not admissible."

In *Taliaferro v. United States*, 213 Fed. 25, the defendant was indicted for carrying on the business of a retail liquor dealer. The Government was permitted to introduce evidence showing that at the time of this alleged offense the defendant was also engaged in keeping a bawdy house. The Court said:

"The question raised by the defendant's plea of 'Not guilty' was whether or not she was engaged in the business of a retail liquor dealer, or a retail malt liquor dealer, as charged in the indictment. If she was, she was guilty, whether she sold to moral or to immoral people. The reputation of her house as one of ill fame, if it had such reputation, was wholly immaterial. *Commonwealth v. Eagan*, 151 Mass. 45, 23 N. E. 494. She could not carry on the business in question without violating the law, even if her rooms were used only for strictly moral purposes; and, if they were used for immoral purposes, still she could not, on that account, be convicted of the offense charged, without the

necessary proof that she carried on the business in question. Keeping a bawdy house—a house of ill fame—is a criminal offense, one involving moral turpitude. Whether or not the defendant was guilty of that offense is immaterial on the question as to whether or not she was a retail liquor dealer without license. *Ballowe v. Commonwealth*, (Ky.) 44 S. W. 646. Ordinarily, when a defendant is being tried for one offense, it is not permissible to prove the commission of another for the purpose of securing a conviction of the first. It is easy to see how such evidence may prejudice the jury against the defendant—may, in fact, lead to her conviction of the offense with which she stands charged, because the jury may believe that she, at least, is guilty of the other offense. Especially in a case where the evidence is conflicting, as in the instant case, the defendant should not have the burden of defending against a separate charge, introduced in evidence, for which she is not indicted, and which has no tendency to legally prove the specific charge for which she is on trial. In brief, the law does not allow one crime to be proved in order to raise a probability that another has been committed. *Dyar v. United States*, 186 Fed. 614, 621, 108 C. C. A. 478, and cases there cited.

We are of the opinion that it was error to receive evidence that the defendant was the keeper of a house of ill fame—a bawdy house—when she was on trial for selling liquor without having paid the special tax.”

In the case of *Marshall v. United States*, 197 Fed. 511, are found the following head notes:

“On the trial of an indictment for using the mails to defraud in conducting the business of a society named in the indictment and alleged

to be a fraudulent organization, it was error to admit testimony showing that defendant was also at the same time conducting another society of precisely the same kind by identical methods which was not mentioned in the indictment."

* * * * *

"The rule which excludes evidence of the commission of other similar offenses by a defendant charged with crime is subject to exception only where a guilty intent must be shown as a separate element of the offense charged, to meet the presumption of accident or mistake, and the exception should not be extended."

* * * * *

In its opinion the Court stated:

"It is urged that the testimony was admissible upon the question of intent; but it is difficult to perceive how the repetition of identical facts can have any legitimate bearing upon this question. If the evidence as to the Standard Society showed a fraudulent intent, the Government's case in that regard was established; nothing more was needed. If, on the other hand, it failed to show fraudulent intent, how was the omission supplied by duplicating the testimony under a different name? A lawful act does not become unlawful because it is repeated. If an act be shown to be illegal, it is enough. The prosecutor may safely rest on such proof; it does not add to its illegal character to show that it was repeated. If the contention of the Government be correct, the acts of the defendant in relation to the Bankers' Company constitute an offense under section 5480 and he had a right to rely upon the rule that he would not be called upon to answer accusations not found in the indictment. It is impossible to say how much of this evidence may have prejudiced the jury."

In the case of *McDonald v. United States*, 264 Fed. 733, the Court stated:

“Evidence of other offenses is not admissible as tending to show defendant’s guilty knowledge unless guilty knowledge or intent is in issue.”

In the case of *Holzmacher v. United States*, 266 Fed. 979, the Court, after stating that the question of intent was in no way involved in the indictment, and that the sole question was, did the defendant use the above language, stated as follows:

“In cases where there are eye or ear witnesses to the happening of an isolated transaction, and the sole question is whether it happened or did not happen, it is not proper or competent to permit the introduction of evidence of other remote and disconnected matters, not charged in some good count in the indictment, to prove intent, where the element of intent is not involved in the crime charged.”

In the case at bar, intent, motive or knowledge were no elements of the offense. The only question before the jury was, did the defendant (1) conduct and maintain a building in which intoxicating liquor was being manufactured, and (2) did he manufacture intoxicating liquor? Upon that point there was positive testimony of a self-confessed accomplice. If the jury believed his testimony, as it could have done without any corroboration, it would have been warranted in finding a verdict of guilt, unaided by the proof of the commission of other offenses, which naturally prejudiced the defendant in the minds of the jury. Can it be seriously argued that the proof

of the offense alleged to have been committed on June 28, 1920, had any tendency to prove the commission of the offense alleged to have been committed on August 4, 1920, and for which latter offense only he was on trial? The only possible excuse for the use of this highly prejudicial testimony was to show the character, or the disposition, or manner of life of the defendant as to make him likely to commit the crime charged, and this under the rules above referred to has no place in our system of criminal procedure. Surely the defendant was entitled to be tried upon competent evidence, and then only for the offense for which he was on trial.

As stated in the case of *Boyd v. United States*, 142 U. S. 450:

“This evidence was collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record, we are con-

strained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

This transaction of June 28th, 1920, was of an entirely different nature from that for which the defendant was on trial except as both may be classified generally as prohibition violations. The transaction of August 4, 1920, was for maintaining a nuisance and for manufacturing liquor; that of June 28, 1920, was for possessing and transporting intoxicating liquor. The defendant was only on trial upon the former charge and proof of that offense certainly could in no wise be established by proof of the latter offense. A different situation might exist if the government had been required to prove a specific intent or motive, but such was not the case. No such burden was placed upon the government. It made out a prima facie case by positive testimony tending to prove all the necessary elements of the offense for which the defendant was on trial. It should have been content and not have sought to overwhelm him to his prejudice before the jury.

In the case of *State v. Proctor*, 8 Okla. Crim. 537, 129 Pac. 77, it is stated:

"Where a defendant is on trial for a specific offense, evidence of unrelated offenses is not admissible unless relevant to the issue and tend-

ing to show motive or intent; and an unlawful intent is not an ingredient of the offense of unlawfully conveying intoxicating liquors."

In the case of *Day v. United States*, 220 Fed. 818, the defendant was convicted of carrying on a business of a wholesale liquor dealer without paying the special tax required by law. In making out this case the Government was allowed to show over objection, that the defendant had made sales similar in character but prior to the time covered by the indictment. The Court, in its opinion, said:

"We are of opinion that it was error to admit this evidence, and its prejudicial effect can scarcely be doubted. It is a familiar and long-established rule that similar acts or misdeeds of the accused are inadequate against him, except where they are material in proof of some necessary element of the offense for which he is on trial. This rule is laid down by all the text-writers and in numberless decisions. An exception is found in cases where the criminality of the act depends upon the intent of the accused, and the wrongful intent must therefore be established. In such cases evidence may be given of prior misconduct of like character, for the purpose of proving the intent with which the particular act was committed. But it seems clear to us that the offense for which the defendant was indicted does not embrace the element of intention. No such element is included or implied in the language of the section which he is charged with violating, and nothing in its provisions or purpose indicates that proof of intent is necessary to warrant conviction. Moreover, it was not claimed that defendant openly engaged in, or held himself out as carrying on, the business of a wholesale liquor dealer. The

distillery with which he was connected was bonded by the brother, in whose name and for whose benefit it was ostensibly conducted.

“There was no proof of general facts and circumstances, such as usually indicate an occupation, from which the jury could find that the business was in fact carried on by defendant; and it therefore become necessary for the Government to show particular sales of such character and number as would justify a finding that he carried on the business for himself, and so came within the statutory prohibition. But it was the nature of these transactions and the circumstances attending them, whether they disclosed the defendant as acting for himself or as agent for his brother, which the jury was authorized to pass upon, and he could not be heard to say that he did not intend to be a wholesale liquor dealer, if his acts and doings warranted the inference that he was actually engaged in that business. In other words, the question of his guilt or innocence turned upon what he did, upon the deductions justified by the transactions themselves, and not at all upon his motive or intention. It follows from this, as we think, that evidence of similar transactions in the year 1909 was erroneously received. The sales made in that year did not show that defendant “carried on the business” of a dealer in 1910, and proof of such sales was not necessary or proper to show his intent respecting the sales he made in the last-named year, because intent is no part of the offense for which he was indicted. We have examined all the authorities cited by the learned counsel for the Government, and are satisfied that none of them sustains his contention. Indeed, it seems to be well settled that exception to the rule which excludes proof of prior misconduct is limited to cases in which intent is a necessary element

of the offense charged. In our judgment this is not such a case, and therefore does not come within the exception."

In the case of *Ford v. United States*, 259 Fed. 555, it is stated:

"All of this testimony strongly suggested that the defendant was connected with this intended unlawful introduction of the wagon load of whiskey. While that would have been the same character of crime covered by this indictment for introducing the liquor found in the automobile, there was no attempt to connect the two. The danger of this kind of evidence is that it is likely to lead the jury aside from the case on trial, confuse the issues and result in a conviction for acts not included in the indictment. We think the evidence was inadmissible."

It might be argued that the Court by his instructions removed any prejudice in the minds of the jury that the introduction of this improper testimony may have created. That argument is answered by the decision of *Boyd v. U. S.* supra, wherein it is stated:

"On a trial for murder, evidence of other crimes, such as robberies, committed by the defendants, is inadmissible; and the error of admitting such evidence is not cured by the judge's charge that defendants were not to be convicted because of the commission of such other crimes.

"Where upon the trial, objection is made to evidence and exception taken to its admission, such exception is not waived by the failure to object to the charge of the Court upon such evidence."

CONCLUSION.

It must be quite clear that an error has been committed by the admission of evidence in this case contrary to the well settled law on the subject. That law, when invoked, must protect all those who come within its sphere, whether the person who invokes its protection seems to be sorely pressed by the weight of the inculpatory evidence in the case or not. It cannot be changed or altered for the purpose of securing the conviction of one who may be guilty and yet be invoked for the purpose of sheltering an innocent man. In the eye of the law all are innocent until convicted in accordance with the forms of law and by a close adherence of its rules.

The defendant, John Basich, was not so convicted. All that he expected to come prepared to answer at the trial was the indictment for maintaining a nuisance and for manufacturing liquor at Newberg on August 4, 1920. How can it otherwise be held but that the introduction of evidence of another and extraneous crime, to-wit, that of possessing and transporting liquor in Portland, on June 28, 1920, was calculated to take him by surprise, and do him manifest injustice by creating a prejudice against his general character. Such evidence tended to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions and to lead them unconsciously to render their verdict in accordance with their views on false issues rather than on the true issues on trial. Speaking of

evidence of other similar offenses, the Circuit Court of Appeals of the first Circuit in the case of *Fish v. U. S.*, 215 Fed. 545, 549, well said:

“Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused and should be received, if at all, in a plain case.”

Whatever may be the object of evidence as to other offenses—whether to prove motive, intent or guilty knowledge, or to show a general plan or scheme, or to prove identity, or to establish sexual intimacy and opportunity—proof of a distinct substantive crime is never admissible unless there is some logical connection between the two, from which it can be said the one tends to establish the other. Without this obvious connection, it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not have been received.

A man cannot be convicted of a given crime solely because he is a bad man generally or has committed other crimes for which he has not been punished. The commission of an independent offense is not proof of the commission of the crime with which the

man is charged. But such proof cannot be said to be without influence on the mind, for certainly if one is shown to be guilty of another similar crime, such showing will permit a more ready belief that the accused might have committed the one with which he is charged and will predispose the mind of a juror to believe the person guilty. Under the long-established rules of Anglo-Saxon jurisprudence in criminal trials, it is not only unjust to the prisoner to require him to defend himself against several offenses instead of one, but is also contrary to the principles of justice to burden a trial with multiplied issues that will serve to confuse and mislead the jury. It is not sufficient to say that the evidence justified the verdict, and therefore, even though the trial court erred in permitting this proof, the case is so clearly made out by other evidence and the defense so weak that the error must be harmless. (*People v. King*, supra.)

The issue of the case on trial is simply this: Did John Basich, at the time stated in the indictment, to-wit, August 4, 1920, maintain a nuisance and manufacture liquor at Newberg, Oregon? There was no element of intent or motive in the case. If he did so maintain a nuisance and manufacture the liquor at the time and place stated, he was guilty of that offense. If he did not, he was innocent. Upon that issue there was testimony of a positive character on the part of a Government witness, Bob Ugan, a self-confessed accomplice of Basich, who testified that

he had been hired by Basich to erect the building at Newberg and to manufacture the liquor thereat, and that he did so. If the jury believed his testimony it would have been warranted in finding a verdict of guilty, but the Government was not content to rely upon the testimony of this accomplice; it sought and succeeded in introducing evidence of a separate and distinct offense, alleged to have been committed by the defendant on June 28, 1920, at Portland, in possessing and transporting liquor thereat, which in itself was a subject of a separate and distinct indictment, and for which he was to stand trial upon the conclusion of this case. That evidence could not help but prejudice the defendant, making a fair trial on the charge alleged in the indictment almost impossible. It is impossible to say what the jury in this case would have done, but for the introduction of this incompetent evidence, much less is it within the province of this Court to say what they should have done.

We feel confident, therefore, that the introduction of this testimony, to which objection was strenuously urged at the trial, does not fall within the exception to the general rule which excludes testimony of other offenses, and that being so, the defendant is entitled to a reversal.

Respectfully submitted,

BARNETT H. GOLDSTEIN,
Attorney for Plaintiff in Error.

No. 3678¹⁷

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Circuit

JOHN BASICH,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the District Court of the

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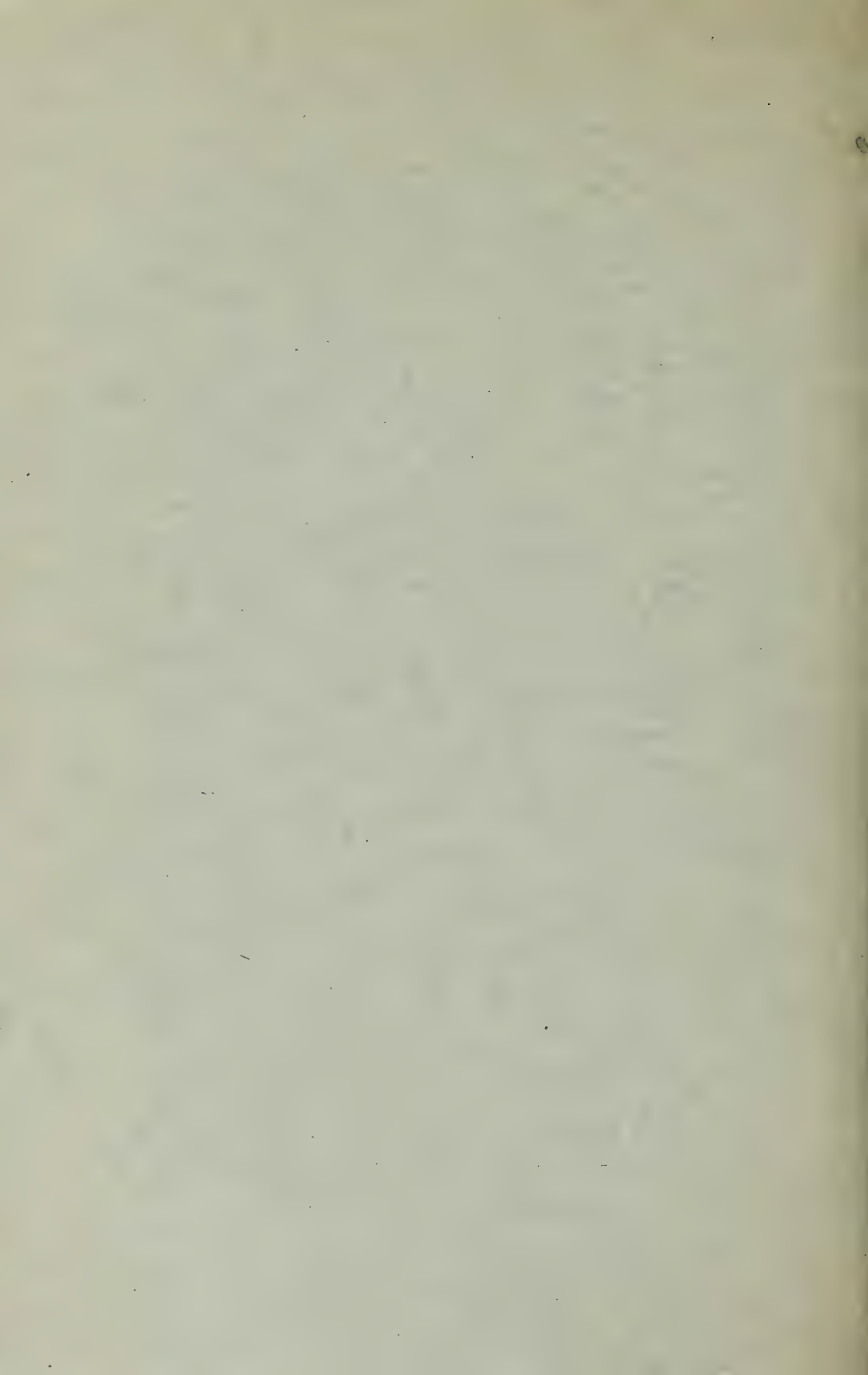
LESTER W. HUMPHREYS,

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Filed



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STATEMENT.

The first count of the indictment on which plaintiff in error, (hereinafter referred to as the defendant) was tried charges him on August 4, 1920, with maintaining a common nuisance within the intent and meaning of the National Prohibition Act by keeping and maintaining a building in the vicinity of Newberg, Oregon, wherein intoxicating liquor was manufactured and kept. The second count of the indictment charges him with manufacturing intoxicating liquor at the same place on the same date, and the third court charges him with having transported intoxicating liquor from the building referred to by means of a Republic automobile truck on August 1, 1920. (Transcript, pages 4, 5 and 6.)

The trial jury returned a verdict of guilty on the first two counts of the indictment and a verdict of not guilty on the third count. (Transcript, page 9.)

On the first count, the defendant was sentenced to be imprisoned in the County Jail of Multnomah County for a term of one year, and, on the second count, he was sentenced to be imprisoned in the same

jail for a period of six months, the two sentences, however, to run concurrently. (Transcript, pages 11 and 12.)

On August 4, 1920, acting under authority of a Government search warrant, Federal Prohibition Agents searched a building on the W. L. Hall ranch in the vicinity of Newberg, Yamhill County, Oregon, and found therein a large distilling apparatus set up and in operation, together with some eight hundred gallons of corn meal mash, about one hundred and fifty gallons of corn moonshine whisky, and, approximately, one thousand pint bottles of uniform shape. (Transcript, pages 29 and 30.)

From the Bill of Exceptions it appears that the principal witness for the Government was one Bob Ugan, who testified that he was employed by the defendant to operate the still and to manufacture the corn moonshine whisky. For his services, Ugan testified, the defendant was to pay him \$300 per month and his expenses. The defendant furnished all materials used in the manufacture of the whisky and assisted Ugan at various times in his work. The still was operated from about the middle of May, 1920, until the time of the raid, during which period

some four or five hundred gallons of whisky were distilled. All of this whisky was bottled in pint bottles, similar to those found by the Prohibition Agents, and was removed from the premises by the defendant. (Transcript, pages 30 and 31.)

Ugan's testimony was corroborated by four witnesses who testified to having seen the defendant go to the building in question on numerous occasions during the spring and summer of 1920. One witness, Delmar Hall, testified to having seen the defendant bring to the building in question materials used in its construction and, on another occasion, to deliver to the building filled grain sacks. (Transcript, page 30.)

To further corroborate the testimony of the witness Ugan, the Government proved that on June 28, 1920, the defendant had in his possession at the Oak Hotel in the City of Portland, 24 pints of moonshine whisky, two bottles of which were introduced in evidence and marked Government's Exhibits E and F. (Transcript, pages 19, 24 and 26.) Expert testimony was then offered by the Government to prove that the bottles found in the possession of the defendant on June 28, 1921, contained corn moon-

shine whisky made by the same process, of the same ingredients and bottled in the same kind of flasks as was the liquor found at the still on August 4, 1920. (Transcript, pages 25, 26, 27 and 28.) The bottles found at the still and offered in evidence and marked Government's Exhibits A. B. and C. are of peculiar shape, being round on one side with beveled corners on the other and are of the same size and shape as the bottles found in defendant's possession at the Oak Hotel on June 28, 1921. (See Government's Exhibits A. B. C. E. and F.)

The defendant urges as his principal ground for reversal, the alleged error of the Trial Court in admitting in evidence proof that the defendant had the 24 pints of whisky in his possession on June 28th, 1921.

ARGUMENT.

The sole question presented by defendant's brief is whether or not the Trial Court erred in the admission of certain testimony introduced by the Government to the effect that on June 28, 1920, the defendant had in his possession at Portland, Oregon, 24 pints of moonshine whisky.

Other assigned errors are not mentioned in the argument and, for that reason, we assume, they have been abandoned.

Home Benefit Association vs. Sargent, 142 U. S. 691-694.

Loomis, Collector of Internal Revenue, vs. Wattles, 266 Federal, 876-878.

Ireton vs. Pennsylvania Company, 185 Federal, 84-86.

We concede that, as a general rule, evidence tending to show the commission by the accused of a separate and distinct crime is inadmissible for the purpose of aiding in the proof that he is guilty of the crime charged. This general rule, however, does not apply to cases where the evidence of another crime tends directly to prove defendant guilty of the crime charged. Evidence which is relevant to defendant's guilt is not rendered inadmissible because it proves or tends to prove him guilty of another and distinct crime.

Williamson vs. United States, 207 U. S. 425-451, 28 Sup. Ct. 163-172.

Moore vs. United States, 150 U. S. 57-61.

Luders vs. United States, 210 Fed. 419-423.

Jones vs. U. S. 179 Fed. 584-604.

Wolfson vs. U. S. 101 Fed. 430-434.

The evidence of which the defendant complains was offered by the Government on the theory that it tended to connect the defendant with the crimes for which he was being tried. The fact that it also tended to show the commission of a separate and distinct crime by the defendant was merely incidental.

The bottles which were found in the defendant's possession on June 28, 1920, were similar in shape and size to the bottles which were found at the still which defendant was charged by the indictment with maintaining. The liquor contained in these bottles, according to expert testimony of the witness Beeman, was made by the same process and of the same ingredients as that found at the still by the Prohibition Agents. (Transcript, page 27. See also Government's Exhibits A, B and C, being bottles found at the still by Prohibition Agents and Government's Exhibits E and F, being bottles found in defendant's possession on June 28th.)

It also appeared from the testimony of the witness Ugan, that defendant had operated the still, which was the subject of the indictment, from about May 15, 1920, until August 4, 1920, during which time he had taken liquor from the place once or twice a week in bottles similar to those introduced in evidence and in quantities ranging from five to ten gallons at a time. (Transcript, pages 30 and 31.)

It would seem certain, therefore, the evidence complained of was clearly material and relevant to the issues presented by the indictment on which the defendant was being tried. It tended to corroborate the testimony of the witness Ugan to the effect that the defendant between the middle of May, 1920, and the 4th of August, 1920, was removing from the premises in question intoxicating liquor manufactured there and exercising a proprietorship over the premises. It was also circumstantial evidence tending to connect the defendant with the still in question due to the fact that the bottles were of the same shape and size as those found at the still and not the ordinary bottle commonly used as a container for whisky, and due, also, to the fact that the whisky found in his possession on June 28th was made of the same

ingredients and by the same process as that found at the still.

The extent to which this evidence might be considered by the Trial Jury was carefully limited by the Trial Judge in his instructions. The jury was instructed on this point as follows:

“Now, there was testimony introduced in this case that in June of 1920 the defendant was apprehended with a suitcase containing liquor. He is not on trial for that offense. That evidence is to be considered by you only as bearing upon the issues tendered by the indictment in this case. It was admitted for no other purpose and is not to be considered by the jury for any other purpose. That is, unless you believe, beyond a reasonable doubt, that the defendant kept and maintained a nuisance, as I have defined that term to you, or that he manufactured intoxicating liquor, or that he transported intoxicating liquor, as stated in the indictment, you would not be justified in finding him guilty simply because you believed that he was in possession of intoxicating liquors at the time of his apprehension.”
(Transcript, page 32.)

In the case of *Williamson vs. United States*, 207 U. S. 425-451, 28 Sup. Ct. 163-172, Mr. Justice White,

speaking for the Supreme Court of the United States, disposed of a similar objection in the following language:

“The contention that the proof on the subjects just stated should not have been admitted, because it tended to show the commission of crimes other than those charged in the indictment, and consequently must have operated to prejudice the accused, is, we think, without merit, particularly as a trial judge, in his charge to the jury, carefully limited the application of the testimony so as to prevent any improper use thereof.”

In the case of *Moore vs. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26, the defendant was indicted for the murder of Charles Palmer. The government relied mainly on circumstantial evidence. Some of this evidence tended to show that the defendant was also guilty of the murder of a man named Camp. Objection was interposed to that part of the evidence. Mr. Justice Brown, speaking for the Court in that case, said (150 U. S. 61, 14 Sup. Ct. 28):

“The fact that the testimony also had a tendency to show that defendant had been guilty of

Camp's murder would not be sufficient to exclude it, if it were otherwise competent."

The only direct evidence available to the Government of the defendant's guilt was the testimony of the witness Ugan, an accomplice. Certainly it was the duty of the Government to corroborate, insofar as possible, his testimony by circumstantial evidence. Great latitude is allowed in the reception of circumstantial evidence and even though its value be very slight, it is nevertheless competent. As was said in the case of *Holmes vs. Goldsmith*, 147 U. S. 150-164:

"The competency of a collateral fact to be used as a basis for legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the litigated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry, or to assist, though remotely, to a determination probably founded on truth."

The fact that the liquor found in the defendant's possession on June 28th was made by the same process, of the same ingredients and bottled in the same flasks as was the liquor found at the still on August 4th, might not be conclusive of the fact that

the liquor found in his possession on June 28th came from the still in question, but, when taken with the testimony of Ugan, to the effect that between May 15th and August 4th, the defendant was taking liquor from this still as often as once or twice a week and when coupled with the testimony of other witnesses to the effect that defendant was seen going to and from the building in question, on numerous occasions during the spring and summer of 1920, we believe that the jury might very well infer therefrom that part, at least, of the testimony of the accomplice was true.

This Court in the case of *Luders vs. United States*, 210 Fed. 419-423, had occasion to pass upon the same kind of an objection as is raised by the defendant in this case. In the *Luders* case this Court said:

“Assuming that the testimony did tend to prove the commission of another offense, its admission was not rendered improper if it was relative to the offense charged in the indictment.”

The same question was decided by this Court in the case of *Jones vs. United States*, 179 Fed. 584-604,

wherein the Court quotes from the case of *State vs. Adams*, 20 Kan. 311-319, as follows:

“Whatever testimony tends directly to show the defendant guilty of the crime charged is competent; though it also tends to show him guilty of another and distinct offense. The party cannot by multiplying crimes diminish the value of competent testimony.”

To the same effect is the case of *Wolfson vs. United States*, 101 Fed. 430-434. The Court in that case stated the law as follows:

“When a defendant is on trial for one offense, irrelevant testimony of the commission of another offense should not be received. If, however, the evidence is relevant, if it tends to prove the commission of the offense for which the defendant is on trial, or, in cases where the intent is material, if it tends to show the intent with which the act charged was committed, the fact that the evidence shows the commission of another offense does not serve to exclude it.”

The books are full of cases to the same effect and we have been unable to find a single case holding that evidence otherwise material and relevant to the issue

was inadmissible merely because it proved or tended to prove the commission of a separate and distinct crime by the defendant. We urge that the evidence objected to in this case was relevant to the issues presented by the indictment. It was offered by the Government for the purpose assigned only and not for the purpose of proving the commission by the defendant of a separate and distinct crime. Its application was carefully limited by the Trial Court in the instructions to the jury and we respectfully submit that no error was committed nor was any substantial right of the defendant infringed upon by the admission of the testimony in question.

Respectfully submitted,

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